



National Parliaments and the Policing of the Subsidiarity Principle

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This thesis has been submitted for language correction.

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Summary

This PhD thesis studies the role of national parliaments in the policing of the EU subsidiarity principle. The Treaty of Lisbon enshrines the Early Warning System (EWS) in Protocol No. 2, according to which national parliaments may review Commission proposals for compatibility with the subsidiarity principle expressed in Article 5(3) TEU. On the basis of the number of reasoned opinions submitted, which count as votes, national parliaments may trigger either a ‘yellow’ or an ‘orange’ card, each of which entails different consequences for the Commission draft act in question. The purpose of this thesis is to analyse the functioning of the EWS and to explore why national parliaments participate in this mechanism. To achieve this task, this thesis analyses the reasoned opinions issued under the EWS. Hence, this thesis firstly conducts a case study of the Commission proposal on the establishment of the European Public Prosecutor’s Office which triggered a ‘yellow card’. This example shows that national parliaments tend to conduct a broad scrutiny of Commission proposals, which includes aspects other than the subsidiarity of the proposal: its legal basis, the competence of the EU to act, its proportionality and its substance. This practice of national parliaments is evaluated according to a textual, structural and functional interpretation of the EU Treaties, and as a result, a narrow subsidiarity test is suggested for the purpose of the EWS. Thereafter, the thesis explores the national procedures of *ex ante* (EWS) and *ex post* (action before the ECJ) scrutiny. In addition, national debates are studied in order to analyse the relationship between national legislatures and executives, between parliamentary majorities and opposition, as well as the reflection of regional interests. This detailed study of debates also points to the first reasons for the participation of national parliaments in the EWS: the protection of idiosyncratic national interests and the restriction of EU redistributive policies. Further reasons for national parliaments’ participation in the EWS are indicated on the basis of two case studies, dealing with the Monti II regulation (competence), and the Tobacco Products Directive (‘delegated legislation’). These suggest that the EWS is used by national parliaments to increase their impact in the EU legislative process. The last case study of this thesis – the ‘Women on Boards’ proposal – ponders the application of the EWS to ‘genuine’ fundamental rights proposals, showing that the subsidiarity tests at stake here are focused to a much greater extent on a political willingness to protect universal values, rather than on efficiency. The thesis concludes by discussing whether the EWS enhances the EU’s democratic legitimacy and decreases the EU’s competence creep, which were the leading ideas behind the introduction of the Protocol No. 2 mechanism. It is pointed out that, although the impact of national parliaments on EU policy-making is uneasy to measure, some of the criticism of national parliaments is taken on board by the EU legislator. Because the ‘competence creep’ of the EU is rather limited, it also does not demand a great deal of involvement on the part of national parliaments.

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Introduction

After the Maastricht Treaty established the subsidiarity principle, Pierre Pescatore argued that without subsidiarity ‘one could [also] have lived quite happily and in peace in European home.’¹ However, subsidiarity has become one of the leitmotifs of European integration. Granting national parliaments the power to control subsidiarity was chosen by the Laeken Declaration and later by the Convention on the Future of Europe as a means of providing for more democratic legitimacy and less ‘competence creep.’ Integrating national parliaments into the decision-making process of the European Union (EU) and granting them control over the EU’s ‘creeping competence’ was supposed to ‘kill two birds with one stone,’ by strengthening both its federal and its democratic safeguards.² This thesis offers a study of this new role of national parliaments in the policing of the subsidiarity principle.

The following parts introduce the research question and show the point of departure of this thesis. The next sections outline the research approach and the structure of the thesis.

1 Research question

‘Democracy was not part of the original DNA of European Integration,’³ and even ‘[t]he current European Union is not a democratic showcase.’⁴ What these thoughts express, in fact, is a perceived lack of legitimacy of the EU, popularly referred to as a ‘democratic deficit.’⁵ The ‘democracy issue’ is that the EU institutions suffer from a legitimacy crisis.⁶ ‘Input’ and ‘output’ legitimacy are two ‘legitimizing beliefs’ for the exercise of governing authority.⁷ As

¹ Pierre Pescatore, ‘Mit der Subsidiarität leben’ in Ole Due, Marcus Lutter and Jürgen Schwarze (eds), *Festschrift für Ulrich Everling* (Nomos 1995) at 1094.

² Robert Schütze, *From dual to cooperative federalism: the changing structure of European law* (Oxford University Press 2009) at 258.

³ Joseph H. H. Weiler, ‘In the face of crisis: Input legitimacy, output legitimacy and the political messianism of European integration’ (2012) 34 *Journal of European integration* 825, 837.

⁴ Armin von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9 to 12 EU Treaty for International Organizations’ (2012) 23 *European Journal of International Law* 315, 316.

⁵ There are two major exceptions: Moravcsik and Majone. Moravcsik argues that ‘democratic deficit’ is a myth: the EU is assessed against the ‘idealized conception of Westminsterian or ancient style democracy.’ Cf. Andrew Moravcsik, ‘The myth of Europe’s democratic deficit’ (2008) 43 *Intereconomics* 331. Majone argues that efficiency-oriented policies in contrast to redistributive policies can be delegated to institutions independent of the political process. This delegation is justified by non-majoritarian sources of legitimacy such as ‘expertise, procedural rationality, transparency, accountability by results.’ Cf. Giandomenico Majone, ‘Europe’s ‘democratic deficit’: The question of standards’ (1998) 4 *European law journal* 5, 28.

⁶ Joseph H. H. Weiler, ‘The transformation of Europe’ (1991) 100 *Yale Law Journal* 2403, 2472.

⁷ Fritz W Scharpf, *Governing in Europe: effective and democratic?* (Oxford University Press 1999) at 6. Weiler adds a third pillar of democratic legitimacy: narrative (entity, myth, dream, political Messianism): in the EU the ‘justification for action and its mobilizing force derive not from process, as in classical democracy, or from

explained by Scharpf, input-oriented legitimacy means that ‘political choices are legitimate if and because they reflect the “will of the people” – that is, if they can be derived from the authentic preferences of the members of a community.’⁸ Under output-oriented legitimacy ‘political choices are legitimate if and because they effectively promote the common welfare of the constituency in question.’⁹ Viewed from this perspective, the transfer of competence from the national level to the EU level within the process of European integration raised the question of the legitimisation of EU authorities and laws, about the Union’s input and output legitimacy, and the balance between them.

The transfer of power expresses the idea that competences that used to be exercised at the national level, have ‘disappeared.’¹⁰ While at the Member State level, the law is enacted by democratically elected parliaments, the European level is perceived as not having the same democratic legitimacy. With the transfer of power, however, the legislative process at European level has strengthened the position of governments, ‘by making the statal executive branch the ultimate legislator in the Community.’¹¹ In addition, the scrutiny of governmental decisions at EU level remains a national process, aimed at holding into account national actors.¹² This creates an input legitimacy deficit. A parallel transfer of democratic legitimacy has not accompanied the transfer of competences; the European level has not received more legitimacy. National parliaments ‘appear[ed] as the net losers in the new institutional equilibrium resulting from EC membership.’¹³

The essence of the EU’s democratic deficit is the asymmetry between input and output legitimacy. Two attempts have been made to solve the EU’s ‘democratic issue’; the first centred on the European Parliament (EP); the second on the national parliaments.

The first of these attempts has been to increase the role of the directly elected EP in the legislative process. Indeed, the EP ‘emerged as a winner in the Lisbon Treaty,’ due to the extension of the ordinary legislative procedure, whereby decisions are taken jointly by the EP

result and success, but from the ideal pursued.’ See Weiler, ‘In the face of crisis: Input legitimacy, output legitimacy and the political messianism of European integration’ 832.

⁸ Scharpf at 6.

⁹ Ibid.

¹⁰ Leonard FM Besselink, ‘National parliaments in the EU’s composite constitution: a plea for a shift in paradigm’ in P. Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Europa Law Publishing 2006) at 119. Besselink points also to the use of ‘transfer’ instead of more neutral ‘attribution’ or ‘conferral’ of competence.

¹¹ Weiler, ‘The transformation of Europe’ 2430.

¹² Besselink, at 119.

¹³ Bruno De Witte, ‘Community law and national constitutional values’ (1991) 18 *Legal Issues of Economic Integration* 1, 8.

and the Council, and the conferral of more control over the appointment of the President of the EU Commission.¹⁴ Critics of the second-order character of EP elections (a well-known claim of Reif and Schmitt is that EP elections have the character of a protest vote against governments in power and that the electoral turnout is lower each time) might also have softened their views after the 2014 EP elections.¹⁵ The elections outcomes¹⁶ show that ‘traditional left-right and pro-anti-European integration counterbalanced the traditional determination to punish national governments,’ proving some politicisation of these elections.¹⁷

The second attempt to strengthen the EU’s democratic legitimacy has been to reinforce the role of the national parliaments within the European legislative process. The latter process, the core of which is the Early Warning System (EWS),¹⁸ will be the subject of examination in this thesis. Beyond the improvement of EU democratic legitimacy, its second rationale was the oversight of the exercise of EU competences.

Declaration No. 23, annexed to the Nice Treaty, first invited national parliaments to participate in the debate on the future of the EU. Next, the European Council, meeting in Laeken on 15 December 2001, adopted a Declaration on the Future of the European Union which pointed towards a new role for national parliaments.¹⁹ Specifically, under the heading of ‘better division and definition of competence in the European Union’, the Declaration asked the question of ‘how is the principle of subsidiarity to be applied here?’, also making sure that a new division of competences would not cause a ‘creeping expansion of the competence of the Union’ or encroach upon the exclusive competences of Member States or

¹⁴ Paul Craig, *The Lisbon Treaty: law, politics, and treaty reform* (Oxford University Press 2010) at 72.

¹⁵ Karlheinz Reif and Hermann Schmitt, ‘Nine Second - order National Elections-a Conceptual Framework for the Analysis of European Election Results’ (1980) 8 *European journal of political research* 3. Cf. Andreas Follesdal and Simon Hix, ‘Why there is a democratic deficit in the EU: A response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies* 533, 536.

¹⁶ The 2014 turnout was 43.09% in comparison to 43% in 2009, hence it did not improve, but also did not fall. See further: <http://www.results-elections2014.eu/en/turnout.html>

¹⁷ See Alexander Trechsel, ‘Reflecting on the Nationalization and Europeanization of European Elections, 30 June 2014’

<<http://www.eui.eu/DepartmentsAndCentres/RobertSchumanCentre/ReflectingOn/3006Trechsel.aspx>. >

For a more critical view see ibid Joseph H. H. Weiler, ‘Fateful Elections? investing in the Future of Europe,’ (2014) 12 *International Journal Of Constitutional Law* 273.

¹⁸ Following the European Convention, I use the name Early Warning System instead of Early Warning Mechanism often used in the literature on the topic, as for example by Philipp Kiiver. Cf. European Convention, Conclusions of Working Group I on the Principle of Subsidiarity, 23.09.2002, CONV 286/02, point II (b).

¹⁹ See Laeken Declaration on the future of the European Union, Annex I to Presidency Conclusions, Laeken 14 and 15 December 2001. For the critical appraisal of the post-Laeken reforms, see Garreth Davies, ‘The post-Laeken division of competences’ (2003) 28 *European Law Review* 686, 695.

regions.²⁰ In the section on democracy, transparency and efficiency in the EU, the Declaration posed the question about the role of national parliaments, namely whether they should be represented in a new institution and whether they should concentrate on the question of division of competences between the EU and the Member States. As an example of this function, the Declaration put forward an idea of a preliminary check concerning compliance with the subsidiarity principle.²¹ To answer these and other questions, the European Council decided to convene a Convention on the Future of Europe.²²

Following the indications of the Laeken Declaration, the Convention established two separate working groups, dedicated to the subsidiarity principle (Working Group I) and to the role of national parliaments (Working Group IV), respectively.²³ Their conclusions overlapped on the issue of granting national parliaments a competence to review the subsidiarity principle.²⁴ Whereas the final report of Working Group IV highlighted that an enhanced involvement of national parliaments would strengthen the EU's democratic legitimacy and 'bring it closer to the citizens',²⁵ the Conclusions of Working Group I provided the rule concerning the subsidiarity scrutiny: 'these improvements should not make decision-making within the institutions more cumbersome or lengthier, nor block it.'²⁶ In conclusion, Working Group I gave three guidelines on the control of subsidiarity principle. First, the EU institutions should reinforce their scrutiny of the subsidiarity principle during the drafting and examination of proposals. Second, an 'Early Warning System,' with a role for national parliaments, should be created, and third, an opportunity for ex-post referral to the Court of Justice on subsidiarity issues should be provided.²⁷ In agreement with Working Group IV, it was thus proposed that national parliaments would be involved in the European legislative process 'for the first time in the history of European construction' through a process of monitoring of the subsidiarity

²⁰ Laeken Declaration on the future of the European Union at 22.

²¹ Ibid at 23.

²² Ibid at 24.

²³ European Convention, Mandate of the Working Group on the principle of subsidiarity, CONV71/02, 30.05.2002.

²⁴ European Convention, Summary of the joint meeting on 22 July 2002, CONV 210/02, 30.07.2002, page 1.

²⁵ European Convention, Final report of Working Group IV on the role of national parliaments, CONV 353/02, 22 October 2002, point 4.

²⁶ CONV 286/02, 23.09.2002, Point I (2).

²⁷ Ibid point II.

principle.²⁸ While putting all national parliaments on an ‘equal footing,’ the system did not make the procedure more cumbersome, and did not create any new bureaucracy.²⁹

The subsidiarity review places itself between the national level and the EU level, allowing national parliaments to contribute to the larger, polycentric EU constitutional order, not confining their role to the national level, as in the case of scrutiny of the government in EU affairs, but broadening it to the EU arena, and thus allowing them to become ‘an integral part of a truly composite constitutional order.’³⁰ In this sense, the subsidiarity review also avoids identifying the democratic deficit in only one institution (e.g. the Council) and transferring the decision-making to an alternative institution (e.g. the EP). In contrast, improving only the national level as a point of reference could have been perceived as unsatisfactory, because the democratic deficit may also affect the Member States themselves (for example, as they often also do not fulfil the ‘democratic and constitutional ideals of full representation and participation’).³¹

The subsidiarity review creates an interaction between national parliaments and the EU institutions, predominantly the Commission. According to its procedure, national parliaments may influence the EU legislative process at a very early stage. As prescribed by Article 12(b) TEU and complemented by the procedure established in Protocol No. 2, national parliaments review all EU legislative drafts sent directly by the Commission for their compatibility with the subsidiarity principle. In light of the reasoned opinions subsequently issued by national parliaments, the EU institutions review the draft and further decide to maintain, amend or withdraw it; in some cases the EU legislator can even stop the legislative procedure. The legislative act created in this process captures the involvement of the national and European polity. It will be one of the aims of this thesis to establish whether and to what extent the subsidiarity review mechanism has helped to address the EU democratic deficit.

As stated above, the second concern of Member States that the subsidiarity review mechanism was supposed to address was the ‘competence creep’ within the EU. To tackle it, the mechanism was to include checks on any tendency of the EU to take shared competences

²⁸ Ibid point II (b)

²⁹ Ibid. The Working Group rejected an idea of creating a body specialized in the subsidiarity monitoring, see in Point I (2).

³⁰ Besselink at 121-123.

³¹ Miguel Poiarés Maduro, ‘Europe and the Constitution: what if this is as good as it gets?’ in Joseph H.H. Weiler and Marlene Wind (eds), *European Constitutionalism beyond the State* (Cambridge University Press 2003) at 84.

away from the Member States. This thesis will also deal with that issue by establishing to what extent national parliaments became guardians of the subsidiarity principle. It will be argued that national parliaments have garnered a far-reaching role extending beyond their position under Protocol No. 2, instead of staying faithful to the wording, structure and function of the subsidiarity review.

The main questions this thesis asks are rooted in the practice of the subsidiarity mechanism as observed thus far, especially, but not limited to, the two ‘yellow cards’ that national parliaments have triggered. *Why do national parliaments participate in the Early Warning System? Why do they go beyond the role granted by Protocol No. 2? And what does this say about the purpose of the Early Warning System?* How can we ‘live with subsidiarity’ without undermining the EU’s ‘capability to function’?³²

2 Point of Departure from Existing Scholarship

The existing literature relevant to this thesis derives from various sources. First, since the Maastricht Treaty, EU legal scholarship extensively contributed to the understanding of subsidiarity and the procedures introduced by the subsequent treaties aiming at making it more operative.³³ In particular, the monograph of A. Estella provided a legal and political critique of the subsidiarity principle 10 years after the entry into force of the Maastricht Treaty.³⁴ The main argument was that subsidiarity is not an apt tool to deal with the federal legitimacy problems, because of a lack of clear legal content and because, from a normative point of view, the vertical logic of subsidiarity, and not necessarily its counter-integrationist logic, does not ‘fit’ the EU’s current federal legitimacy problems. Moreover, Estella explained the European Court of Justice’s (ECJ) restrained subsidiarity jurisprudence first through its concerns about its own legitimacy; it did not want to be perceived as taking political decisions instead of technical-legal ones. The second explanation was that subsidiarity posed a threat to the Court’s own EU integration agenda. While Estella’s work was an important stepping-stone toward the discussion on subsidiarity, it did not elaborate on the EWS. This thesis thus addresses this gap, namely the lack of a subsidiarity analysis from the perspective of national parliaments.

³² Pescatore at 1080 (own translation).

³³ See Chapter 1.

³⁴ Antonio Estella De Noriega, *The EU principle of subsidiarity and its critique* (Oxford University Press 2002).

However, because the role of national parliaments in the EU has been of interest to both legal and political science scholars, as a second source, this thesis draws upon the relevant literature on the new role of national parliaments, including comparative studies of the procedures of scrutiny of governments in EU affairs and the factors that condition more effective control.

The seminal edited volume of Maurer and Wessels studied the institutional and procedural developments in national parliaments as a response to the challenges of EU integration.³⁵ They established a ‘considerable’ change in the legal and institutional aspects over time: the creation of EU affairs committees, the establishment of the procedure of ‘mandating’ in some Member States, or an early involvement in the scrutiny of EU documents. Yet, they also highlighted a ‘modest’ impact of national parliaments on the real life patterns of access to information and influence, scoring below what the EU Treaties and national provisions offered.³⁶ The study of real patterns of behavior of national parliaments led Maurer and Wessels to define four models of parliamentary involvement: first, strong policy makers and ‘national players’; second, ‘potential’ or latent ‘national players;’ third, ‘modest policy-making legislatures’ and finally ‘slow adapting parliaments.’³⁷ Their results were confirmed in another volume on the topic by O’Brennan and Raunio. In their view ‘national parliaments have proven that they are capable of institutional adaptation and learning,’ and hence they ‘should no longer be simply labeled as losers or victims of integration.’³⁸

Furthermore, a volume edited by Philipp Kiiver reviewed three main aspects of parliamentary participation in EU affairs along comparative lines: first, the regional aspect of parliamentarisation; second, the parliamentary participation beyond the control of the executive and third, the involvement of national parliaments in the drafting of EU Treaties.³⁹ The study pointed out that regional parliaments tend to seek new ways to participate in EU affairs, yet the involvement of national parliaments in the Convention on the Future of

³⁵ Andreas Maurer and Wolfgang Wessels (eds), *National Parliaments on their Ways to Europe. Losers or Latecomers?* (Nomos 2001).

³⁶ Andreas Maurer and Wolfgang Wessels, ‘National Parliaments after Amsterdam: From Slow Adapters to National Players?’ in Andreas Maurer and Wolfgang Wessels (eds), *National Parliaments on their Ways to Europe Losers or Latecomers?* (Nomos 2001) at 435.

³⁷ Ibid at 461-462.

³⁸ John O’Brennan and Tapio Raunio, ‘Introduction: deparliamentarization and European integration’ in John O’Brennan and Tapio Raunio (eds), *National parliaments within the enlarged European Union: from ‘victims’ of integration to competitive actors?* (Routledge 2007) at 16.

³⁹ Philipp Kiiver, ‘Parliaments, regions and European Integration; Fresh Perspectives on the European Constitutional Order’ in Philipp Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Europa law publishing 2006) at 4.

Europe was ‘mostly very modest,’ which may simply show the remoteness of EU issues for the citizens and their representatives in the parliament.⁴⁰

A volume edited by Tans, Zoethout and Peters presents another comparative contribution on national parliamentary systems, seeking common elements in the ways in which national parliaments control EU decision-making process.⁴¹ In contrast to the previous studies, their aim was to answer the question of ‘how to find constitutional norms to improve ‘post-national’ democracy?’⁴² The findings of Tans et al. point to three main ‘common grounds’ in the organization of control of EU decision-making: adherence to the democracy principle, adherence to the principle of ministerial accountability, leading role for EU affairs committees and mutual dependence in the executive-legislative relationship. The common grounds, according to the authors, show that the idea of investing national parliaments with the role to establish more input legitimacy faces practical problems and hence other avenues for parliamentary participation should be sought, for example direct accountability of EU institutions to parliaments or the possibility to bring actions before the ECJ.⁴³

These studies offer a valuable overview of parliamentary procedures in EU affairs, mostly taking into account their powers vis-à-vis their governments. Having said this, it must be taken into account that the functioning of the EWS does not depend only upon national executives. Protocols Nos. 1 and 2 offer a right to national parliaments to receive information directly from the Commission, in contrast to a situation where a government would forward information to parliaments. Of course, national parliaments may receive explanatory memoranda from the government, which include a subsidiarity assessment, but these are not the main source of information necessary to participate in the EWS. Moreover, the EWS was established to grant national parliaments a direct influence at the EU level, in contrast to the earlier procedure where their influence was exercised via national governments. Hence, whereas this thesis builds upon the studies reviewed above, it goes beyond this literature and focusses on the actual operation of the EWS in order to look for reasons and motives for national parliaments’ participation.

⁴⁰ Ibid at 9.

⁴¹ Olaf Tans, ‘Introduction: National Parliaments and the European Union: In Search of Common Ground’ in Olaf Tans, Jit Peters and Carla M Zoethout (eds), *National parliaments and European democracy: a bottom-up approach to European constitutionalism* (Europa Law Publishing 2007) at 4.

⁴² Ibid at 6.

⁴³ Tans, ‘Conclusion: National Parliaments and the European Union: Coping with the Limits of Democracy’ at 247.

In this particular area, Philipp Kiiver published the first comprehensive book on the Early Warning System, which inquired into the procedure and the content of the reasoned opinions issued within the COSAC pilot project between 2004 and 2011.⁴⁴ In his exploration of the parliamentary attitudes in the EWS, he divided national parliaments into four groups, taking into account their approach to subsidiarity scrutiny.⁴⁵ First, ‘literalists’ stick to the wording of Protocol No. 2 and do not assess the political merits of Commission proposals. This approach is taken mainly by non-Eurosceptic parliaments, which try to avoid being seen as in competition with the EP, but which still want their opinions to fulfil the conditions required to be counted as a reasoned opinion.⁴⁶ Second, ‘pseudo-colegislators’ try to position themselves in the EWS as co-legislators, through issuing detailed reports. This attitude is represented in the upper chambers, compensating for their rather weak position in the national system.⁴⁷ Third, ‘pre-empters’ use the ‘Barroso dialogue’ rather than the EWS.⁴⁸ Kiiver explains that this approach is present in typically ‘strong’ parliaments, Eurosceptic or upper chambers, with a possibility that all these factors play a role.⁴⁹ Finally, the ‘absentees,’ parliaments that do not participate in the EWS, correspond with the parliaments that were typically labelled as weak scrutinizers.⁵⁰ Although there might be some overlap, Kiiver highlights that his typology only partially coincides with the old categories of ‘strong,’ ‘moderate’ and ‘weak’ parliaments.⁵¹

Moreover, Kiiver’s research points to two other notions connected to the EWS. First, he designated the EWS as an ‘imperfect’ accountability mechanism. Indeed, the Commission must justify its measure, but this justification covers the proposal only at an initial stage and the only sanction available is indirect, through opposition in the Council.⁵² The accountability within the EWS according to Kiiver is also at least partially a legal one – national parliaments often bring legal arguments, typical of courts rather than parliaments – which in turn means parliaments are willing to look for new ways to enforce accountability.⁵³ The motive of

⁴⁴ Philipp Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* (Routledge 2012) at 77.

⁴⁵ Ibid at 136.

⁴⁶ Ibid at 137.

⁴⁷ Ibid at 138.

⁴⁸ Ibid.

⁴⁹ Ibid at 139.

⁵⁰ Ibid.

⁵¹ Ibid at 136.

⁵² Ibid at 103 ff.

⁵³ Adam Cygan, *Accountability, parliamentarism and transparency in the EU* (Edward Elgar Publishing 2013) at 125.

accountability through the involvement of national parliaments is also discussed in Adam Cygan's monograph. According to the latter, 'national parliaments have a duty to pursue accountability,' which is required for achieving greater EU legitimacy.⁵⁴ Yet the author argues that the EWS does not present an adequate answer, because it does not provide sufficient output legitimacy.⁵⁵ Following on the Lisbon judgment of the German Constitutional Court Cygan argues that the EP is not inserting sufficient input legitimacy into the legislative process which in consequence does not improve output legitimacy. In addition, Cygan points out further limits: the heterogeneous EU scrutiny procedures in the Member States and the fact that EU regulation is not limited to the ordinary legislative procedure, but also encompasses intergovernmental processes.⁵⁶

Kiiver's second point builds upon the fact that arguments from national parliaments often have a legal character, although they are likely politically motivated. The idea of national parliaments as a Council of States is based upon the consultative role of the French Conseil d'Etat, which is consulted by the government before a bill is sent to the parliament.⁵⁷ Kiiver sees a possibility that a coalition of active chambers, most probably upper chambers, which are more independent from national executives, will develop and assess the lawfulness and justifications of EU drafts in an advisory rather than a co-legislative manner.⁵⁸

Whereas Kiiver's collective role for national parliaments focuses more on ensuring compliance with subsidiarity than on its function in enhancing the EU's democratic legitimacy,⁵⁹ the suggestion by another scholar – Ian Cooper – of an 'emerging tricameralism,' in his view, provides for more democratic representation at EU level.⁶⁰ Cooper argues that the EWS 'creates a third chain of representation linking the citizen with the EU' and rather than repeating the representative functions of the EP and the Council, it has a 'representational "value added" effect.'⁶¹ Cooper shows it on the basis of three aspects. First, national parliamentary elections may not mirror public opinion views on EU affairs, as

⁵⁴ Ibid at 7-9.

⁵⁵ Ibid at 214.

⁵⁶ Ibid at 212.

⁵⁷ Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 127.

⁵⁸ Ibid at 133.

⁵⁹ Ibid at 145.

⁶⁰ I. Cooper, Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union, 35 *Journal of European Integration* 2013, 531-546.

⁶¹ Ian Cooper, 'Bicameral or Tricameral? National Parliaments and Representative Democracy in the European Union' (2013) 35 *Journal of European Integration* 531 at 533-534.

these are a rather marginal issue in the public debate, yet in a broader sense of representation, the EU can be seen as representing ‘diffuse national interests represented by a parliament as a whole.’⁶² Second, within the EWS, national parliaments take a position independently from the executive.⁶³ And third, with the EWS national parliaments operate as a ‘virtual’ chamber; one that may not be homogeneous and does not meet in one place, but one that still performs the main parliamentary functions, namely legislating, representing and deliberating.⁶⁴

Against the background of the existing literature on the topic, this thesis explores the functioning of the EWS in a number of new ways. First, my empirical analysis is based upon the reasoned opinions from *after* the entry into force of the Lisbon Treaty until August 2014. This sample was chosen in order to study why national parliaments participate in the subsidiarity review. Second, this thesis argues for a limited role for national parliaments within the EWS, putting forward a set of textual, structural and functional arguments and arguing that the ‘Barroso initiative’ offers a venue for addressing broader concerns. Moreover, it is argued that, for the sake of the EU institutional balance, the EWS should not lead to granting national parliaments broad participation rights, which could, for example, lead to a veto right. Third, the thesis elaborates upon questions not addressed thus far in the contributions to the topic, such as the relationships between institutions at the national level (executive, legislative) and between majority and opposition under the EWS. Fourth, this thesis systematically analyses the content of national parliaments’ reasoned opinions, studying in depth such issues as the review of the principle of conferral, the scrutiny of delegations included in Commission proposals, as well as the assessment of Commission proposals against fundamental rights standards.

3 Method and sources

This thesis studies the role of the national parliaments in the policing of the subsidiarity principle from a legal point of view, taking into account the political context of the mechanism. I will deal with the different topics described in this thesis from a legal point of view. This concerns in the first place the design and role of the subsidiarity review. In this regard, I review the existing literature on the principle of subsidiarity, as well as on the role of national parliaments in the EU. Building on this research, I then conduct an empirical

⁶² Ibid at 541.

⁶³ Ibid at 542.

⁶⁴ See more in Ian Cooper, ‘A ‘virtual third chamber’ for the European Union? National parliaments after the Treaty of Lisbon’ (2012) 35 West European Politics 441.

analysis of all of the reasoned opinions issued by national parliaments thus far. I argue that the reasoned opinions of national parliaments usually consist of an inquiry into the principles of conferral and proportionality and the merits of the proposal, and only to a lesser extent into the principle of subsidiarity, thereby going beyond the role ascribed to them by Protocol No. 2. This point is illustrated by the second ‘yellow card’ ever issued by national parliaments with regard to the proposal concerning the European Public Prosecutor’s Office.

The fact that the intensity of national parliaments’ participation in the subsidiarity review is differentiated demands that this thesis look at diverse groups of national parliaments which may seem to lack coherence. In this regard, it needs to be underlined that the thesis takes what might be termed an *accordion* approach.⁶⁵ Depending on the purpose of each chapter, the scope of the legislatures subject to analysis might stretch or squeeze like an accordion, varying between broad sweeps and narrowly focussed sections. In particular, in Chapter 3, I provide an overview of the measures adopted in the national parliaments of *all* Member States to enable subsidiarity review, and I categorise these into groups. The idea is to present a closed catalogue of different designs of *ex ante* scrutiny. Similarly, Chapter 4 takes the same broad overview of possible *ex post* review procedures. In contrast to Chapter 3, the explanation of different national procedures builds on the political science categories of ‘weak’ and ‘strong’ parliaments vis-à-vis their executives in EU affairs put forward in political science literature. In the chapter in question, such an approach was possible because the *ex post* scrutiny – the subsidiarity action before the ECJ – relies upon the national executive bringing the case before the ECJ. Chapter 5 – the purpose of which is to examine the impact of the Lisbon Treaty on: executive-legislative relations; parliamentary majority-opposition relations; and the representation of the regional interests – demanded an analysis of a sample of Member States based on factors such as the structure of the state, the party system, the model of executive-legislative relations and the extent to which members of the legislature are democratically elected. The choice of a limited number of national systems was justified by the idea of presenting the main political systems, not claiming however that all the possibilities are taken into account, and by the feasibility of the study, which demanded a detailed inquiry into parliamentary debates that are mostly conducted in national languages, restricting the set of documents that could be examined in detail. The following

⁶⁵ The accordion is probably not as popular anymore, as it was in the times when my father occasionally played it to accompany family events. The Oxford Dictionary defines it as ‘a musical instrument played by stretching and squeezing with the hands to work a central bellows that blows air over metal reeds, the melody and chords being sounded by buttons or keys.’ Cf. <http://www.oxforddictionaries.com/definition/english/accordion>.

chapters, which focus on the principle of conferral, delegated legislation and fundamental rights, respectively, have a two-tier construction. To establish the role of national parliaments in these fields it is necessary to first, ‘stretch the accordion’ to give an overview of the concerns of national parliaments expressed in their reasoned opinions, and then to ‘squeeze’ it by looking at three particular case studies of Commission proposals.

4 Structure

This thesis is structured in two parts. Briefly, the first part concentrates on the design of the EWS and its implementation at the national level. The second part focuses on the content of the reasoned opinions issued by national parliaments.

In order to discover *why* national parliaments participate in the subsidiarity review, it is first necessary to delve into the position of national parliaments in the EU Treaties, the notion of subsidiarity and the scope of that procedure. Accordingly, in Chapter 1, I describe the evolution of the participation of national parliaments in the EU, together with the establishment of the principle of subsidiarity itself, the basic rules of the operation of the EWS; the other avenue for participation – the ‘Barroso initiative’ – and the possibilities of inter-parliamentary cooperation. Building on this, Chapter 2 focuses on the scope of the EWS. In this regard, I study the second ‘yellow card’ triggered by national parliaments and compare its outcomes with the first ‘yellow card,’ to draw conclusions on the possible consequences of the EWS.

In Chapter 3, I examine the procedures that Member States have incorporated in order to accommodate the *ex ante* subsidiarity review at the national level. The analysis of constitutional and infra-constitutional provisions, including rules of procedure in chambers points to three distinct systems of scrutiny. Depending on the role of the parliamentary committee involved in the control of subsidiarity, the European Affairs committees and specialised committees, I indicate three possible means of scrutiny, namely centralised, decentralised and mixed, the latter of which combines both of the former. In Chapter 4 on *ex post* scrutiny, I also discuss the arrangements for any subsidiarity action that governments may lodge before the ECJ on behalf of national parliaments. Taking into account the approach of the ECJ to the subsidiarity principle, it is asked whether subsidiarity action provides a reliable avenue for national parliaments and whether a change in the approach of the ECJ may be desirable.

Having established the applicable procedures, in Chapter 5 I analyse in detail the content of reasoned opinions of parliaments in the UK, Germany, Poland and Belgium. The aim is to show how the subsidiarity review impacts upon the executive-legislative relationship; the rapport between the majority and opposition in EU affairs, and whether it gives any voice to regional interests.

The next two chapters investigate different areas in which national parliaments seem to apply a particularly broad notion of subsidiarity review. First, Chapter 6 explores the control of competence concerning Commission proposals by delving into the Monti II case. Chapter 7 analyses the involvement of national parliaments in the scrutiny of delegations of powers to the Commission to adopt delegated and implementing acts. This activity of national parliaments is illustrated with reference to the Commission proposal on tobacco labelling. Finally, Chapter 8 considers the reasoned opinions that scrutinise Commission proposals with regard to the protection of fundamental rights. In this chapter, I inquire in detail into the case of the Commission proposal concerning the increase of the share of women on executive and non-executive boards in listed companies, in order to explore whether the subsidiarity review is suitable for questions of fundamental rights protection in Europe.

The concluding chapter assesses the influence of national parliaments on democratic legitimacy and decreased centralisation. Specifically, by drawing upon the previous chapters of this thesis, I assess whether national parliaments, through their reasoned opinions, contribute to diminishing the ‘democratic deficit’ and the ‘competence creep’ of the EU, which were the main motivations for the introduction of national parliaments into the EU legislative process.

Chapter 1: National Parliaments and Subsidiarity in the EU Treaties

Introduction

During the course of the European integration process, national parliaments have been increasing their rights step-by-step: the Treaties of Maastricht and Amsterdam were the first steps. The Laeken Declaration and the Convention for the Future of the European Union clearly stated that national parliaments, as vessels of democracy, should have more of a say in the EU, and should control the so-called ‘competence creep.’ Accordingly, first the failed Constitutional Treaty and then the Lisbon Treaty granted national parliaments a number of new functions, above all that of the guardians of the subsidiarity principle. Protocol No. 2 annexed to the TEU, as well as the TFEU, enshrines the EWS, in which national parliaments may issue reasoned opinions concerning the compatibility of a Commission proposal with the principle of subsidiarity. The new role of national parliaments poses many questions, especially as its focus is on the ‘deliciously vague word’ subsidiarity,¹ which also has its own history within EU law. This chapter thus focuses on the establishment of the EWS, analysing the role of national parliaments and the incorporation of the subsidiarity principle into the EU Treaties. The question posed here sets the background for the forthcoming chapters: *How is the EWS regulated in the Treaties?*

This chapter aims to discuss this question starting from an analysis of the treaty changes that granted national parliaments a position in European integration. In this respect, Section 1 explores the relevant provisions of the Treaty of Maastricht, the Treaty of Amsterdam, the Constitutional Treaty and the Treaty of Lisbon. In Section 2, I elaborate on the subsidiarity principle and its relevance for the EWS, also exploring the reforms of the treaties, but with a focus on the subsidiarity principle itself. In Section 3, I study in detail the role of other EU institutions in the subsidiarity scrutiny. Because the EWS is not the only tool available to national parliaments to influence draft EU acts, Section 4 explores the ‘Barroso initiative.’ Section 5 aims to show that national parliaments do not operate in a vacuum. There is a number of ways that they can exchange their views on subsidiarity, and also establish broader inter-parliamentary cooperation. The last section elaborates on the new developments connected to the Eurozone crisis.

¹ Joseph H. H. Weiler, ‘The reformation of European constitutionalism’ (1997) 35 Journal of Common Market Studies 97, 127.

1 Shaping the role of national Parliaments in the European Union

I will discuss the incorporation of national parliaments into the EU institutional framework, starting with the reforms implemented via the Maastricht and Amsterdam Treaties, then outlining those attempted by the Constitutional Treaty and finishing with the current position of national parliaments under the Treaty of Lisbon. Before the Maastricht Treaty, in the period between the 1950s and the mid-1970s, national parliaments showed little interest in European integration. Because of the ‘Luxembourg compromise’ – granting unanimity in the decision making process – the rather limited competences of the Community, and the pro-European public opinion in the Member States, ‘national legislatures remained marginal and passive actors in the arena of EC competence.’² Change came with the accession of Denmark and the UK, two Member States with a less pro-European sentiment which led them to establish European Affairs Committees to scrutinize Community affairs.³ In addition, the White Paper on the Single Market and the Single European Act extended the scope of Community competence and introduced the qualified majority voting (QMV) in the Council. The period leading up to the ratification of the Maastricht Treaty, which brought about the establishment of the European Union and transferred new competences to EU level, engendered changes in the domestic provisions with regard to the participation of national parliaments. Since this time, other Member States have also established European Affairs Committees.⁴

1.1 The Treaty of Maastricht

The Maastricht Treaty was the first to recognise formally national parliaments within primary law. The preceding national level reforms had gained attention at EU level, and this culminated in the inclusion of the first provisions concerning national parliaments in the Maastricht Treaty⁵ declarations: Declaration no.13 ‘on the role of national parliaments in the European Union’ and Declaration no.14 ‘on the conference of the parliaments.’ Nonetheless, the Treaty of Maastricht recognized national parliaments only to a minimal extent.

Specifically, Declaration no.13 encouraged ‘greater involvement of national parliaments in the activities of the European Union’ via the governments of the Member States. The

² O’Brennan and Raunio at 10.

³ Ibid at 10-11.

⁴ Ibid at 11.

⁵ Treaty on European Union (TEU), [1992] OJ C 191/1.

governments had to ensure that national parliaments received Commission proposals for legislation in ‘good time’ for information or possible examination. Moreover, Declaration no. 13 called upon national parliaments and the European Parliament to arrange regular meetings between the parliamentarians interested in the same issues. Further, Declaration no. 14 concerned the Conference of the Parliaments, consisting of members of the European Parliament and members of national parliaments.⁶

The Treaty of Maastricht was thus the first step towards elevating the role of national parliaments in the European Union context. However, the innovations on their own were not of great legal importance, as the declarations did not have a binding character.⁷

1.2 The Treaty of Amsterdam

The next move in introducing national parliaments into the European treaties was the Protocol to the Treaty of Amsterdam ‘on the role of national parliaments in the European Union.’ This protocol aspired ‘to encourage greater involvement of national parliaments in the activities of the European Union and to enhance their ability to express their views on matters which may be of particular interest to them.’⁸

The first part of the annexed protocol stipulated that all Commission consultation documents (green and white papers and communications) had to be forwarded ‘promptly’ to the national parliaments.⁹ This obligation was incumbent upon the Commission.¹⁰ In contrast, Commission proposals for legislation had to be made available by national governments to national parliaments in ‘good time.’¹¹ The protocol further established a minimum period of six weeks between the point at which a legislative proposal is made available in all languages and placing it on the Council agenda, in order to grant national parliaments time to discuss it.¹² Finally, although the protocol had a binding character, the formulation that the governments ‘should’ inform their respective national parliaments should be seen only as a

⁶ See further Section 2.1. of this chapter.

⁷ There is no evidence found of the practical impact of the Maastricht Treaty.

⁸ Treaty of Amsterdam, [1997] OJ C340/1, Protocol on the Role of National Parliaments in the European Union, Preamble, second recital.

⁹ Treaty of Amsterdam, Protocol on National Parliaments, Art 1.

¹⁰ O’Brennan and Raunio at 13.

¹¹ Treaty of Amsterdam, Protocol on National Parliaments, Art 2.

¹² Treaty of Amsterdam, Protocol on National Parliaments, Art 3.

recommendation.¹³ The second part of the protocol concerned the Conference of European Affairs Committees (COSAC).¹⁴

In the context of the subsidiarity review presented in the following sections, it is worth underlining that the second protocol, the Protocol ‘on the application of the principles of subsidiarity and proportionality,’ did not mention the role of national parliaments at all. This is an important point: national parliaments were not yet seen as partners, fit to discuss subsidiarity issues with the European institutions. However, in the provisions on COSAC, interestingly, we read that this institution was invited to approach the EP, the Council and the Commission on the legislative activities of the EU, amongst which were included the area of freedom, security and justice and fundamental rights, and also in relation to the application of the principle of subsidiarity.¹⁵

1.3 The Constitutional Treaty

The Constitutional Treaty was the first attempt to go beyond protocols and to prescribe a role for national parliaments in the Treaty itself.¹⁶ First, the Treaty recognized the role of national parliaments via the principle of representative democracy; through taking decisions in the European Council or the Council, governments are themselves democratically accountable either to their national parliaments, or to their citizens.¹⁷ Second, the Treaty also provided for information rights for national parliaments, namely with regard to the flexibility clause,¹⁸ participation in the evaluation mechanisms of the Union policies and political monitoring of Europol and the evaluation of Eurojust's activities,¹⁹ and in the ordinary²⁰ and the simplified revision procedures.²¹ Finally, the national parliaments were to be notified about incoming Union membership applications.²²

¹³ Philipp Kiiver, ‘Some suppositions, propositions, tests and observations in light of the fate of the European Constitution’ in Jan Wouters, Luc Verhey and Philipp Kiiver (eds), *European constitutionalism beyond Lisbon* (Intersentia 2009) at 137.

¹⁴ See Section 5 below.

¹⁵ Treaty of Amsterdam, Protocol on National Parliaments, Art 6.

¹⁶ While this might have a symbolic character, because the parliaments were included in the Treaty, in formal sense, Protocols have the same legal values as the treaties to which they are attached. Cf. Koen Lenaerts and Piet Van Nuffel, *Constitutional law of the European Union* (Sweet and Maxwell 2011) at 823.

¹⁷ Treaty establishing a Constitution for Europe, [2004] OJ C310/1, Art I-46(2).

¹⁸ Art I-18.

¹⁹ Art I-42.

²⁰ Art IV-443.

²¹ Art IV-444.

²² Art I-58(2).

1.4 The Treaty of Lisbon

However, due to the collapse of the Treaty Establishing a Constitution for Europe, it was the Lisbon Treaty that finally introduced national parliaments into the Treaty as a ‘new player in the institutional balance.’²³

Whereas the Constitutional Treaty acknowledged the intermediary role of national parliaments in the principle of representative democracy, providing that ‘Member States are represented (...) in the Council by their governments, themselves democratically accountable either to their national Parliaments, or to their citizens,’²⁴ the Treaty of Lisbon lifted their position in the institutional framework of the European Union itself. Article 12 TEU recognizes national parliaments’ active contribution to the good functioning of the Union.²⁵ This provision enumerates the key functions of national parliaments. At the beginning it refers to the rights of national parliaments indicated in Protocols No. 1 and No. 2: the right to receive all the EU draft legislative acts directly from the EU institutions and the scrutiny of the subsidiarity principle.²⁶ Next, with regard to the Area of Freedom, Security and Justice, national parliaments gained information rights concerning the content and results of the evaluation of the implementation of the Union policies in that area by Member States’ authorities. In addition, national parliaments may evaluate Eurojust’s and Europol’s activities together with the EP.²⁷ Article 12 TEU mentions, moreover, the function of national parliaments in the revision procedure of the Treaties.²⁸ Finally, national parliaments are notified of applications for accession to the Union²⁹ and take part in the inter-parliamentary cooperation between national parliaments and the European Parliament.³⁰ Outside of Article 12 TEU, other important functions of national Parliaments are included in Article 71 TFEU (information on the proceedings of the Council’s standing committee on the operational cooperation on internal security), Article 81(3) TFEU (notification of planned applications of

²³ Youri Devuyst, ‘European Union’s Institutional Balance after the Treaty of Lisbon: Community Method and Democratic Deficit Reassessed’ (2007) 39 *Georgetown Journal of International Law* 247, 314.

²⁴ Similar to Treaty of Lisbon, [2007] OJ C306/1, Art 10.

²⁵ This provision was not foreseen in the Lisbon Treaty, hence for example, the obligation to forward legislative and non-legislative documents directly to national parliaments was foreseen only in Protocol No. 1 to the Constitutional Treaty, in contrast to Article 12 TEU, which contains all the main functions of national parliaments.

²⁶ Lisbon Treaty, Art 12 (a) and (b) TEU.

²⁷ Art 12 (c) TEU.

²⁸ Art 12 (d) TEU.

²⁹ Art 12 (e) TEU.

³⁰ Art 12 (f) TEU.

the special *passarelle* in the area of family law) and Article 352(2) TFEU (flexibility clause).³¹

Protocols No. 1 and No. 2 contain detailed provisions concerning national parliaments. Specifically, Protocol No. 1 ‘on the Role of National Parliaments in the EU’ provides that the Commission keeps national parliaments abreast of its agenda: it directly forwards to national legislators, contemporaneously as to the EP and the Council, a number of non-legislative acts, such as the green and white papers and communications, its annual legislative programme, or any other instrument of legislative planning or policy.³² Further, Protocol No. 1 obliges the Commission and the EP to forward their draft legislative initiatives directly to national parliaments, at the same time as to the other institutions. Similarly, the Council forwards legislative drafts originating from a group of Member States, the Court of Justice, the European Central Bank or the European Investment Bank.³³ In Article 3, Protocol No. 1 foresees the subsidiarity review mechanism, the details of which details are elaborated in Protocol No. 2. Protocol No. 1 also imposes an eight-week period between the submission of a translated draft legislative act to national parliaments and it being placed on the Council’s agenda.³⁴ An exception to the eight week period may occur in duly justified exceptional cases, but even then, in contrast to the Amsterdam Protocol, the Council may adopt such proposal only ten days after it was placed on its agenda. Other information rights for national parliaments concern the agendas for and the outcomes of meetings of the Council (including their minutes),³⁵ the initiatives of the European Council on the planned *passarelles* (change from the unanimity to qualified majority in the Council or change from special to ordinary legislative procedure)³⁶ and the annual report of the Court of Auditors.³⁷ Finally, Protocol No. 1 provides for inter-parliamentary cooperation, which is elaborated upon in Section 5 of this chapter.³⁸ At this juncture, I omit the competences of national parliaments under Protocol No. 2, as I discuss them in the following part on the subsidiarity review.

³¹ Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 7-9.

³² Treaty of Lisbon, Protocol No. 1 on the Role of National Parliaments in the European Union, Art 1.

³³ Protocol No. 1, Art 2.

³⁴ Protocol No. 1, Art 4.

³⁵ Protocol No. 1, Art 5.

³⁶ Protocol No. 1, Art 6.

³⁷ Protocol No. 1, Art 7.

³⁸ Protocol No. 1, Art 9 and 10.

2 Characteristics of the subsidiarity principle

Subsidiarity is a general³⁹ and basic⁴⁰ principle of EU law. It is also labelled ‘fundamental,’⁴¹ ‘constitutional’⁴² and a ‘regulatory principle’⁴³ or a ‘principle about the functioning of democracy,’ as it ‘shapes the structures within which democracy operates.’⁴⁴ The subsidiarity principle understood as a principle of governance can be dated to the Peace of Westphalia of 1648, with its claim of exclusive state sovereignty and freedom of religion, which is reflected ‘in the international law principles of state sovereignty and non-interference.’⁴⁵ Other possible roots of subsidiarity lie in Pope Pius XI’s Encyclical *Quadragesimo Anno*, which focused on the relationship between society and the state.⁴⁶ However, it was German constitutional law through which the subsidiarity principle became a principle of the EU legal order.⁴⁷

In the EU, the subsidiarity principle was introduced for a number of reasons. Firstly, Craig outlines that subsidiarity was seen as an answer to the lack of a clear division of different

³⁹ Art 3 (b) TEU (Maastricht Treaty). See also Stephen Weatherill and Ulf Bernitz, *The role of regions and sub-national actors in Europe* (Hart 2005) as well as Gráinne de Búrca, ‘The principle of subsidiarity and the Court of Justice as an institutional actor’ (1998) 36 *Journal of Common Market Studies* 217, 218; George A Bermann, ‘Taking subsidiarity seriously: federalism in the European Community and the United States’ (1994) 94 *Columbia Law Review* 331, 388.

⁴⁰ Articles A and B TEU (Maastricht Treaty). The subsidiarity principle expressed in Article A TEU (‘This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, *in which decisions are taken as closely as possible to the citizen*’ [emphasis added]) was labelled by de Búrca as ‘democratic or full-blown subsidiarity’, whereas the one expressed in Art 3(b) EEC as the formally justiciable expression of the principle, referring only to the exercise of power on the part of the Community institutions or the Member States.’ See Gráinne de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ Harvard Jean Monnet working paper series <<http://jeanmonnetprogram.org/archive/papers/99/990701.html>> at 12-13.

⁴¹ Koen Lenaerts and Piet Van Nuffel, *Constitutional law of the European Union* (Sweet and Maxwell 2005) at 112. Further, under the Constitutional Treaty subsidiarity, together with the conferral and proportionality principles, was labelled as one of the ‘fundamental principles.’ (Constitutional Treaty, Art I-11).

⁴² Thomas Blanke, ‘The Principle of Subsidiarity in the Lisbon Treaty’ in Niklas Bruun, Klaus Lörcher and Isabelle Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart 2012) at 236; Robert Schütze, *From dual to cooperative federalism: the changing structure of European law* (Oxford University Press 2013) at 246. According to Schütze, subsidiarity enters to EU system from German constitutional law.

⁴³ Cygan at 121.

⁴⁴ Nicholas W Barber, ‘The limited modesty of subsidiarity’ (2005) 11 *European Law Journal* 308, 316.

⁴⁵ David Edward, ‘Subsidiarity as a Legal Concept’ in Pascal Cardonnel, Allan Rosas and Nils Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (Hart 2012) at 93.

⁴⁶ Deborah Z Cass, ‘The word that saves Maastricht? The principle of subsidiarity and the division of powers within the European Community’ (1992) 29 *Common Market Law Review* 1107, 1110-1112. However, Barber points out two main differences between European and Catholic subsidiarity versions; the former is ‘more restricted’ because it concerns democratic public bodies while the other one deals with much broader collective entities. Second, the European subsidiarity can gain support from different political positions while the other one lays on ideological Catholic arguments. Barber at 310.

⁴⁷ Schütze, *From dual to cooperative federalism: the changing structure of European law* at 246.

types of competence in the treaties.⁴⁸ The second reason built upon the first: in the uneasy cases of deciding upon the limits of EU powers, subsidiarity was seen as a complementary criterion of ‘better’ achieving the objective. Third, the aim of subsidiarity was to prevent ‘excessive centralisation’ via treaty amendments, jurisprudence and harmonization. Finally, subsidiarity was supposed to boost ‘pluralism and the diversity of national values.’

The principle of subsidiarity raises ‘fundamental questions about the appropriate locus of political and legal authority within a complex and multiple-layered polity.’⁴⁹ In particular, subsidiarity addresses the issue of the *exercise* of competences in areas shared by Member States and the European Union.⁵⁰ Subsidiarity is ‘called upon to arbitrate the tension between integration and proximity in all matters dealt with by the Union and its Member States.’⁵¹ As a ‘constitutional safeguard of federalism,’ subsidiarity aims at restraining the exercise of powers allocated to the EU.⁵² In other words, subsidiarity ‘only determines whether in a particular case, which is already within Community competence, action should be taken at the Community or at the national level.’⁵³

It has been long discussed whether subsidiarity represents a legal or a political principle. Some point out that subsidiarity is clearly legally binding, and under judicial control of the ECJ.⁵⁴ On the one hand, Tridimas says subsidiarity is ‘political in nature,’ which thus has a consequence for the jurisprudence of the ECJ – there is no possibility for the Court to apply a high level of scrutiny.⁵⁵ As a result, it means that its enforcement must remain within the purview of political institutions.⁵⁶ On the other hand, it is often put forward that subsidiarity is both a legal and political principle.⁵⁷ Schütze talks about both the political and the judicial

⁴⁸ Paul Craig, ‘Subsidiarity: A political and legal analysis’ (2012) 50 JCMS: Journal of Common Market Studies 72, 73.

⁴⁹ de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ at 43.

⁵⁰ Akos G Toth, ‘Is Subsidiarity Justiciable?’ (1994) 19 European Law Review 268, 269.

⁵¹ Koen Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism’ (1993) 17 Fordham International Law Journal 846, 848.

⁵² Schütze, *From dual to cooperative federalism: the changing structure of European law* at 247.

⁵³ Akos G Toth, ‘The principle of subsidiarity in the Maastricht Treaty’ (1992) 29 Common Market Law Review 1079, 1082.

⁵⁴ Theodor Schilling, ‘A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle’ (1995) 14 Yearbook of European Law 203, 211-213. Schilling states that in the Dworkinian sense Art 3(b)(2) EC, current Art 5(3) TEU expresses a rule, but subsidiarity understood broadly can be seen a principle which provides that decisions must be taken as close as possible to the citizen. Subsidiarity as a principle serves to protect ‘subsidiarity as a rule’.

⁵⁵ Takis Tridimas, ‘The Rule of Reason and its Relation to Proportionality and Subsidiarity’ in Antoinette Schrauwen (ed), *Rule of Reason Rethinking another Classic of European Legal Doctrine* (2005) at 120.

⁵⁶ Jit Peters, ‘National Parliaments and Subsidiarity: Think Twice’ (2005) 1 European Constitutional Law Review 68, 70.

⁵⁷ de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ at 2.

nature of subsidiarity – the first dimension focusing on the procedural aspects of subsidiarity, whereas the latter focuses on its ‘substantiation’ before the ECJ.⁵⁸

2.1. Subsidiarity in EU Treaties

The earliest trace of subsidiarity in the treaties is Article 130r (4) of the EEC Treaty, introduced by the Single European Act.⁵⁹ This provision stated that ‘[t]he Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of the individual Member States.’ The reasoning behind the use of the subsidiarity principle by the Single European Act only for the environmental field is questioned by Toth, who sees this policy area as demanding, more than others, action at European or international level.⁶⁰

The Maastricht Treaty defined subsidiarity for the first time, granting it a binding force vis-à-vis the whole treaty.⁶¹ The Maastricht Treaty elevated subsidiarity to one of the ‘main pillars of the Community’, by placing it among the essential provisions of the Treaty.⁶² The ‘clear legal core of subsidiarity’⁶³ was formulated in Article 3b of the EC Treaty, which was added by the TEU:

‘In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States *and can therefore*, by reason of the scale or effects of the proposed action, be better achieved by the Community.’ (emphasis added)

Although welcomed by some as ‘an important, if undervalued, component of the relationship between Community and Member States and the way in which power is distributed between them,’⁶⁴ the introduction of the subsidiarity principle in the Maastricht Treaty was criticised by others as a ‘retrograde step,’ weakening the Community and slowing down European

⁵⁸ Schütze, *From dual to cooperative federalism: the changing structure of European law* at 257.

⁵⁹ For the discussion if this provision indeed embodied the subsidiarity principle (and its confirmation) see Christian Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* (1996) at 42-47. Lenaerts traces subsidiarity’s roots to the Treaty of Rome, which incorporated a “‘common-sense” idea that government should be no more centralized than it is strictly necessary for it to achieve the objectives assigned to its powers.’ Lenaerts, 852. See also Vlad Constantinesco, ‘Who’s afraid of subsidiarity?’ (1991) 11 *Yearbook of European Law* 35, 42.

⁶⁰ Toth, ‘The principle of subsidiarity in the Maastricht Treaty’, 1092.

⁶¹ Calliess at 67.

⁶² Ibid at 68.

⁶³ de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ at 14.

⁶⁴ Cass at 1134.

integration.⁶⁵ Toth regarded the introduction of the subsidiarity principle as ‘inappropriate,’ as the Treaty did not distribute competences between the Union and the Member States in a clear and systematic way – ‘the only context in which the principle can work.’⁶⁶ Moreover, according to Toth, the tests inherent in the provision at stake – ‘the test of effectiveness’ (‘if and in so far as’) and the ‘test of scale’ (‘by reason of the scale and effects’) – may lead to contradictory results, as one of them may speak in favour of the Union and other in favour of the Member States.⁶⁷

In December 1992, the European Council met to discuss the problems of the Community after the negative referendum in Denmark on the Maastricht Treaty, with the aim of regaining the confidence of citizens in the construction of Europe.⁶⁸ The ‘Overall Approach’ annexed to the Conclusions of the European Council indicated that subsidiarity ‘contributes to the respect for national identities of Member States and safeguards their powers.’⁶⁹ Subsidiarity, as the ‘Overall Approach’ labelled it, was a ‘dynamic concept’ which ‘allows Community action to be expanded where circumstances so require, and conversely, to be restricted or discontinued where it is no longer justified.’⁷⁰ The ‘Overall Approach’ points out that subsidiarity answers the question ‘Should the Community act?’ and that to satisfy the subsidiarity principle, both the ‘national insufficiency test’ as well as the ‘comparative efficiency test’ must be fulfilled.⁷¹

The ‘Overall Approach’ also establishes guidelines for each of the paragraphs of Article 3b EC Treaty.⁷² On subsidiarity specifically, the guidelines aimed to provide for more clarity in the application of the two prongs of the subsidiarity test. To fulfil the subsidiarity test, first ‘the issue under consideration has transnational aspects which cannot be satisfactorily regulated by Member States.’⁷³ The second guideline points out that the Community action satisfies the subsidiarity principle when ‘actions by Member States alone or lack of Community action would conflict with the requirements of the Treaty (...) or would otherwise significantly damage Member States’ interests.’ Three examples are given: the

⁶⁵ Toth, ‘The principle of subsidiarity in the Maastricht Treaty’, 1105.

⁶⁶ Ibid at 1103.

⁶⁷ Ibid at 1097-1098.

⁶⁸ European Council in Edinburgh, 11-12 December 1992, Conclusions of the Presidency.

⁶⁹ Conclusions of the Presidency, Overall approach to the application by the Council of the subsidiarity principle and Article 3b of the Treaty on European Union, Annex 1 to Part A at 14.

⁷⁰ Conclusions of the Presidency, at 17.

⁷¹ Ibid at 19. The tests are elaborated on in Chapter 2.

⁷² Ibid at 19-22.

⁷³ Ibid at 20.

need to correct distortion of competition; avoidance of disguised restrictions on trade or strengthening of economic and social cohesion. The third guideline conditions compliance with subsidiarity on the ‘clear benefits [of Community action] by reason of its scale or effects compared with action at the level of Member States.’ In addition, the ‘Overall Approach’ provides that the subsidiarity reasoning has to be ‘substantiated by qualitative or, wherever possible, quantitative indicators.’⁷⁴

The ‘Overall Approach’ also gives instructions for all institutions to observe the subsidiarity principle when they examine Community proposals. In this respect, it points out that the Commission in its pre-legislative consultations could include the subsidiarity aspects of a proposal. A recital of the proposal will refer to the compatibility with the principle of subsidiarity and the explanatory memorandum will provide more detail in this respect, when necessary.⁷⁵ The Commission should also prepare an annual report on the observance of Article 3b of the EC Treaty in its activities. Indeed, the Commission drafted its first report on the subsidiarity principle in 1994, later replaced by broader reports on ‘Better Lawmaking.’⁷⁶

In order to safeguard an effective application of the principle of subsidiarity by EU institutions, the Edinburgh Council envisaged that the EP would present an Inter-institutional Agreement in this respect.⁷⁷ The document adopted, which is still valid today, established that the Commission, while exercising its right of initiative and the EP and the Council, while exercising their powers, should ‘take into account’ the subsidiarity principle.⁷⁸ For example, the provision of the Inter-institutional Agreement that the explanatory memorandum for Commission proposals should include a subsidiarity assessment is of high importance for the EWS, and is nowadays a common practice in Commission proposals.

Despite the attempt to bring more clarity to the application of the subsidiarity principle, the Edinburgh Guidelines and the Inter-Institutional Agreement were perceived as ‘vague and only indicative.’⁷⁹ Nonetheless they represented an attempt to make subsidiarity

⁷⁴ Ibid.

⁷⁵ Ibid at 23.

⁷⁶ de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’, 33.

⁷⁷ Conclusions of the Presidency, General Conclusions, at 4.

⁷⁸ Interinstitutional declaration on democracy, transparency and subsidiarity, Bull. EC 10-1993 at 119. The declaration is referred to rather by scholars than by the EU institutions themselves.

⁷⁹ Ingolf Pernice, ‘Framework Revisited: Constitutional, Federal and Subsidiarity Issues’ (1995) 2 Columbia Journal of European Law 403, 408.

‘operational’⁸⁰ and in Lindseth’s view, they suggested a procedural dimension to the subsidiarity principle, demanding that the Community conducts an inquiry before undertaking legislative steps.⁸¹

As a compromise between Germany and the UK (both supporters of accommodating subsidiarity in the treaties), on the one hand, and France together with some southern Member States (in favour of mentioning the subsidiarity principle only in the preamble), on the other, a protocol ‘on the application of the principles of subsidiarity and proportionality’ was added to the Amsterdam Treaty.⁸² The Amsterdam Protocol borrows the idea of subsidiarity as a ‘dynamic concept’⁸³ from the Edinburgh Conclusions and restates that compliance with subsidiarity must be demonstrated by ‘qualitative or, wherever possible, quantitative indicators.’⁸⁴ In addition, the Protocol repeats the requirement that both the ‘national insufficiency test,’ as well as the ‘comparative efficiency test’ must be met for subsidiarity compliance.⁸⁵ At the heart of the Amsterdam Protocol are the guidelines established for the examination of the subsidiarity principle presented earlier in the Edinburgh Declaration.⁸⁶ The Protocol maintained the obligation on the Commission to justify their proposals with regard to subsidiarity in the accompanying explanatory memorandums from the Edinburgh Declaration.⁸⁷ Moreover, the Commission is required to submit an annual report on the application of the subsidiarity principle.⁸⁸

In addition, the Amsterdam Protocol repeats the provisions regarding the form of action, which should be ‘as simple as possible,’ and more specifically fulfil the requirement of choosing directives over regulations and framework directives over detailed measures.⁸⁹ This provision is placed in the Amsterdam Protocol alongside the guidelines for the assessment of subsidiarity. In fact, the choice of the type of legal act can be seen much closer to the idea of

⁸⁰ Christian Timmermans, ‘Subsidiarity and transparency’ (1999) 22 Fordham international law journal 106, 108.

⁸¹ Peter L Lindseth, *Power and legitimacy: Reconciling Europe and the nation-state* (Oxford University Press 2010) at 195.

⁸² Michaela Heilbronner, ‘Die Justiziabilität des Subsidiaritätsprinzips im Lichte der Subsidiaritätsprotokolle’ in Ingolf Pernice (ed), *Der Vertrag von Lissabon: Reform der EU ohne Verfassung?; Kolloquium zum 10 Geburtstag des WHI* (Nomos 2008) at 138.

⁸³ Treaty of Amsterdam, Protocol on the application of the principles of subsidiarity and proportionality, Art 3.

⁸⁴ Treaty of Amsterdam, Protocol on the application of the principles of subsidiarity and proportionality, Art 4.

⁸⁵ Treaty of Amsterdam, Protocol on the application of the principles of subsidiarity and proportionality, Art 5. The requirement of fulfilling both tests at once is not directly envisaged in Article 5(3) TEU. Yet, a historical interpretation would suggest that that both tests must be fulfilled for the EU to act.

⁸⁶ Treaty of Amsterdam, Protocol on the application of the principles of subsidiarity and proportionality, Art 5.

⁸⁷ Treaty of Amsterdam, Protocol on the application of the principles of subsidiarity and proportionality, Art 9.

⁸⁸ Treaty of Amsterdam, Protocol on the application of the principles of subsidiarity and proportionality, Art 9.

⁸⁹ Treaty of Amsterdam, Protocol on the application of the principles of subsidiarity and proportionality, Art 6.

a proportionality principle, as it rather concerns a ‘how’ question.⁹⁰ The ‘General Approach’ of the Edinburgh Council is hence more accurate in this respect, as it placed the provision on the form of action under the third paragraph of Article 3b of the EC Treaty (‘nature and extent of Community action’), wherein the proportionality principle is currently enshrined.⁹¹

In sum, no major changes concerning the subsidiarity principle have been introduced compared to the 1992 Edinburgh version. The Amsterdam Protocol is hence often seen simply as a mere extract of the central principles established in the Edinburgh ‘Overall Approach’;⁹² the guidelines ‘largely restate the broad political questions in open-ended terms, and do not provide strong legal criteria to answer them.’⁹³ Nonetheless, the Amsterdam criteria are still referred to by the Commission⁹⁴ and national parliaments alike.⁹⁵

The Constitutional Treaty provided a new wording of the subsidiarity principle in comparison to its Maastricht version, in Article I-11(3).⁹⁶ This treaty was also the first that foresaw a role for national parliaments as ‘subsidiarity watchdogs,’ making sure that EU draft legislative acts comply with the subsidiarity principle.⁹⁷ Protocol No. 2 ‘on the application of the principles of subsidiarity and proportionality’ enshrined this procedure.

However, proposals to introduce other sorts of subsidiarity concerning both its political and judicial enforcement were studied at the time. The Convention on the Future of Europe Working Group I discussed a number of institutional ideas for the protection of the subsidiarity principle. The ‘political monitoring’ possibilities studied by the Working Group I included the creation of a ‘Mr (or Ms) subsidiarity’ to assist each member of the European Council and the European Parliament, with verifying and giving a timely opinion on the compliance of proposals the principle of subsidiarity.⁹⁸ At a later stage, a position of a ‘Mr or Ms Subsidiarity’ within the Commission, or of a Vice-President of the Commission,

⁹⁰ So also qualified in Calliess at 567. De Búrca sees these provisions as ‘the linkage’ between subsidiarity and proportionality. See also de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’, 30.

⁹¹ Conclusions of the Presidency, p. 212.

⁹² Calliess at 66.

⁹³ Gráinne De Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’, *Harvard Jean Monnet Working Paper* 7, (1999), p. 24.

⁹⁴ Report from the Commission on Subsidiarity and Proportionality, 18th Report on Better Lawmaking covering the year 2010, COM(2011) 344, p. 2.

⁹⁵ See for example House of Commons, Reasoned opinion on the Draft Directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, COM(2012) 614.

⁹⁶ Cf. Nicholas W Barber, ‘Subsidiarity in the Draft Constitution’ (2002) 11 *European Public Law* 197.

⁹⁷ Ian Cooper, ‘The Watchdogs of Subsidiarity: National Parliaments and the Logic of Arguing in the EU’ (2006) 44 *Journal of Common Market Studies* 281.

⁹⁸ CONV 71/02, Point II a.

ensuring the compliance of proposals with subsidiarity, was discussed.⁹⁹ In this case, it was decided, however, that every Commissioner should be responsible for compliance with the subsidiarity principle in the areas under his or her competence, in addition to the Commission's own competence to decide on its internal organisation.¹⁰⁰ Another option was the creation of an *ad hoc* institution consisting of national parliamentary representatives, a proposal which, however, at later stages of the debates, was perceived rather negatively.¹⁰¹ The creation of an *ad hoc* body was ruled out as too cumbersome for the decision-making process.¹⁰²

The 'legal monitoring' options included the creation of an *ad hoc* 'subsidiarity chamber' within the ECJ.¹⁰³ However, the Group concluded that the Court could take such an organisational measure itself.¹⁰⁴ Moreover, the Group also pondered upon establishing an *ex ante* judicial mechanism, between the adoption of the EU legislative act and its entry into force, inspired by provisions of the Member States for monitoring the constitutionality of laws.¹⁰⁵ In fact, the vision of creating a Constitutional Council for the Community as an equivalent to the French Conseil Constitutionnel had been proposed much earlier. This prominent idea of Weiler, Haltern and Mayer was put forward before the Convention: they proposed a Constitutional Council which 'would have jurisdiction only over issues of competences (including subsidiarity) and would decide cases submitted to it after a law was adopted, but before coming into force.'¹⁰⁶ It was foreseen that any Community institution, Member State or the majority of European Parliament could bring such an action. The Constitutional Council would consist of the President of the ECJ and members of Member States' constitutional courts. However, the conclusions of Working Group I abandoned the idea of a Constitutional Council, as in the view of the group, the introduction of a judicial review during the legislative phase would lead to the loss of the political nature of the subsidiarity review.¹⁰⁷ In addition, granting such powers was perceived as problematic, as the

⁹⁹ European Convention, Summary of the Meeting of 17 June 2002, CONV 106/02, point 3.

¹⁰⁰ CONV 286/02, Point II a.

¹⁰¹ European Convention, Summary of the Joint Meeting on Monday 22 July 2002, CONV 210/02, p. 2.

¹⁰² CONV 286/02, Point I c.

¹⁰³ CONV 71/02, Point II b.

¹⁰⁴ CONV 286/02, Point II c.

¹⁰⁵ CONV 286/02, Point II c.

¹⁰⁶ Joseph H. H. Weiler, Ulrich R Haltern and Franz C Mayer, 'European democracy and its critique' (1995) 18 West European Politics 4, 38.

¹⁰⁷ CONV 286/02, Point II c.

ECJ would control subsidiarity at a different stage than conferral or proportionality principles.¹⁰⁸

None of these ideas has been given a ‘green light.’ The Constitutional Treaty proposed, for the first time, the EWS, and the possibility for a national parliament, which has issued a reasoned opinion, to lodge a subsidiarity action¹⁰⁹ against an adopted legislative act before the Court. Both of these mechanisms were seen as a ‘process-based approach’ in contrast to creation of a new institution.¹¹⁰ Working Group IV on national parliaments highlighted the need to ensure that these mechanisms ‘would be simple and that [they] would not unnecessarily delay decision-making-process.’¹¹¹ Already at that time, they appeared as a compromise solution;¹¹² it was a technical response to the question of subsidiarity control and the increasing role of national parliaments without the further complication of institutional structure and burdening of the EU legislative procedure.¹¹³

The current wording of Article 5(3) TEU, based on the Constitutional Treaty Article I-11(3),¹¹⁴ was introduced by the Lisbon Treaty. Its text reads as follows:

‘Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.’

Two differences between the Maastricht and the Lisbon subsidiarity are visible: a textual and a substantive one. First, the text of Article 3b of the EC Treaty combined the two parts of the subsidiarity test by stating ‘and can therefore,’ whereas the new Article 5(3) TEU uses the formula of ‘but can rather.’ Because of the Edinburgh Declaration, and the later Amsterdam Protocol, it is without doubt that both subsidiarity tests must be fulfilled. How should this

¹⁰⁸ Ibid. For criticism of the idea of subsidiarity monitoring between the moments of adoption and entry into force (in the manner of the French Conseil Constitutionnel), see the opinion of AG Jacobs given to Working Group I: European Convention, Summary of the Meeting on 25 June 2002, CONV 156/02, p. 3-4.

¹⁰⁹ CONV 286/02, Point II c. Art. 9 of Protocol No. 2 did not however mention that an earlier reasoned opinion was necessary to lodge the action.

¹¹⁰ European Convention, Final Report of Working Group IV on the role of national parliaments, CONV 353/02, Point 24.

¹¹¹ Ibid.

¹¹² This was a recommendation of ‘the majority of the members of the Group.’ See CONV 353/02, Point 24.

¹¹³ Jean-Victor Louis, ‘National Parliaments and the Principle of Subsidiarity – Legal Options and Practical Limits’ in Ingolf Pernice and Evgeni Tanev (eds), (Nomos 2009) at 136.

¹¹⁴ See further Barber, ‘Subsidiarity in the Draft Constitution’.

change thus be read? Calliess argues that ‘and can therefore’ in the Maastricht version implied that the negative criterion acted as an independent criterion of equal importance, relative to the positive one.¹¹⁵ The Lisbon version ‘but can rather’ seems to imply a stronger causal connection between the two. Yet, as they are different tests it is unclear how the ‘but’ can be read in any way other than ‘and’.

In terms of substance, the new subsidiarity formula has an added value because of its reference to sufficiency of national action at ‘central level or at regional and local level.’ Ziller points out that this addition, first proposed by the European Convention, was ‘rather symbolic – destined at recognition of regional and local realities in the Member States.’¹¹⁶ In contrast to the Maastricht version of subsidiarity, which ‘[did] not reflect the philosophy of allowing smaller units to define or achieve their own ends, and refer[ed] only to two levels: that of the nation state and that of Community,’ the added phrase now highlights that the national level is multi-layered.¹¹⁷ This means that a subsidiarity violation is possible regardless of the national level at stake – central, regional or local – that can sufficiently achieve the objective.¹¹⁸

2.1 Design of the EWS

The second subparagraph of Article 5(3) TEU states that ‘[t]he institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.’ The EWS procedure to which Article 5(3) refers is established in Protocol No. 2, and its design is the following.

On the basis of Articles 4 and 5, the Commission, the European Parliament and the Council shall forward draft legislative acts to national parliaments, providing a justification regarding the principle of subsidiarity and proportionality for each proposal, including a detailed statement to enable the appraisal of compliance with these principles. Article 3 provides that for the purposes of Protocol No. 2, ‘draft legislative act[s]’ shall include proposals from the Commission, initiatives from a group of Member States, initiatives from the European

¹¹⁵ In German „und daher”, Calliess at 110.

¹¹⁶ Jacques Ziller, ‘Le principe de subsidiarité’ in Jean-Bernard Auby and Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2014) at 528 (own translation).

¹¹⁷ de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ at 16.

¹¹⁸ Lenaerts and Van Nuffel, *Constitutional law of the European Union* at 134.

Parliament, requests from the Court of Justice, recommendations from the European Central Bank, and requests from the European Investment Bank, for the adoption of a legislative act.

Article 6 grants national parliaments eight weeks from the date of transmission of a draft legislative act to submit a reasoned opinion to the Presidents of the European Parliament, the Council and the Commission explaining why the draft is not in compliance with the principle of subsidiarity.¹¹⁹ The institution from which the draft originates, should ‘take account’ of the reasoned opinions received. If, however, the number of reasoned opinions exceeds certain thresholds, two special procedures may be triggered.¹²⁰ First, in the procedure labelled as the ‘yellow card,’¹²¹ if the reasoned opinions issued by national parliaments are equal to at least one third of all the votes allocated to national parliaments, the draft must be reviewed. For the proposals in the area of freedom, security and justice, the respective threshold is one quarter of the votes of national parliaments. Subsequently, the initiating institution may decide to maintain, amend or withdraw the draft, giving reasons for its decision.¹²² Second, in the procedure commonly referred to as the ‘orange card,’¹²³ if the reasoned opinions against a proposal within the ordinary legislative procedure represent at least the majority of votes assigned to national parliaments, the Commission must review the draft legislative act. Accordingly, the Commission may decide to maintain, amend or withdraw the draft. If it decides to maintain the draft, the Commission should provide a reasoned opinion on the compliance of the draft with the subsidiarity principle.¹²⁴ This reasoned opinion of the Commission, together with the reasoned opinions of the national parliaments, is forwarded to the EU legislator (namely, the Council and the EP), which has the final word. The EU legislator should consider these opinions, and if a majority of 55% of the votes in the Council

¹¹⁹ Critically on the 8-weeks deadline see: Damian Chalmers’ evidence to the House of Lords. House of Lords, European Union Committee, 10th Report of Session 2007–08, ‘The Treaty of Lisbon: an impact assessment’, Volume II: Evidence.

¹²⁰ Reasoned opinions count as votes. Article 7(1), Protocol No. 2 assigns two votes for each national parliament: in Member States with a bicameral parliament, each of the two chambers shall have one vote.

¹²¹ The notion of ‘yellow card’ comes from football jargon. See Jean-Victor Louis, ‘The Lisbon Treaty: The Irish ‘No’: National Parliaments and the Principle of Subsidiarity—Legal Options and Practical Limits’ (2008) 4 *European Constitutional Law Review* 429, 438. In football, the referee sanctions with a ‘yellow card’ a player of one team who has fouled a player of another team.

¹²² Protocol No. 2, Art 7(2).

¹²³ The ‘orange card’, which was not mentioned in the Constitutional Treaty but agreed to in the Brussels European Council of June 2007 owes its name to the Dutch origin of this complementary mechanism. Louis, ‘The Lisbon Treaty: The Irish ‘No’: National Parliaments and the Principle of Subsidiarity—Legal Options and Practical Limits’ at 438.

¹²⁴ Protocol No. 2, Art 7(3).

or a majority of the votes cast in the EP is of the opinion that the proposal is contrary to the principle of subsidiarity, the legislative procedure is halted.

To operationalise the subsidiarity review, the Commission itself proposed a number of arrangements that ‘ensure the smooth operation of the mechanism.’¹²⁵ Accordingly, the Commission gave national Parliaments the possibility to decide upon the language in which they want to receive legal drafts. This also means that the Commission sends proposals at different times, depending on when the translation is ready. To standardize the different moments of receipt, the Commission arranged to send a ‘lettre de saisine’ after the final language translation, which sets an identical deadline for all the national parliaments to submit a reasoned opinion. Moreover, the Commission obliged itself not to count August within the eight-week deadline, as it is the usual parliamentary recess month. With regard to the scope of reasoned opinions, the Commission urged national parliaments to distinguish in their opinions between the indications of subsidiarity violations and other critical comments on the draft legislative acts. This differentiation is necessary, in the view of the Commission, as the subsidiarity review and the political dialogue (since 2006) function in parallel. Further, on the counting of national parliaments’ submissions, the Commission committed itself to count all the different aspects of subsidiarity violations expressed in the reasoned opinions of national parliaments towards the thresholds of Protocol No. 2. If the threshold is met, within eight weeks, the Commission will issue an assessment of the criticised proposal. Most interestingly, in the 2009 letter to national parliaments, the Commission expressed a commitment to reply to national parliaments’ opinions that did not meet the threshold or arrived after the deadline. This approach clearly goes beyond the wording of Article 5, para. 1 of Protocol No. 2, which prescribes that the Commission (or other institution from which the draft originates) shall *take account* of the reasoned opinions issued by national parliaments or by a chamber of a national parliament. The commitment to reply to opinions that did not meet the threshold, or that arrived after the deadline, effectively implies a reply to every reasoned opinion of a national Parliament. The final important aspect that the Commission highlighted is that it will not submit modified proposals for another assessment of their compatibility with the subsidiarity principle.

¹²⁵ Letter from Barroso to national Parliaments of 1.12.2009 available at http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm.

The functioning of the procedure of Protocol No. 2 has been analysed and criticised by EU scholarship. Even before the entry into force of the Lisbon Treaty, at the stage of the Constitutional Treaty, it was questioned whether the new system would be satisfactory.¹²⁶ Under the Lisbon Treaty, three main issues of the EWS were listed: ‘incentive problems, logistical problems, and weaknesses inherent in the subsidiarity review.’¹²⁷ These weak points of subsidiarity scrutiny refer to, first, the reluctance of majoritarian parliaments to challenge their government’s position on EU affairs, and low electoral benefits from engagement in EU affairs; second, the short eight-week deadline and high volume of proposals to scrutinize; and third, the lack of a ‘red card’¹²⁸ force of the reasoned opinions that could stop the legislative procedure.¹²⁹ Also, the issue that only legislative acts can be checked within the subsidiarity review is considered as limiting its effectiveness and function.¹³⁰ It is also bemoaned that, at the stage when parliaments are supposed to send reasoned opinions, the Commission has already decided upon the compatibility of its proposals with subsidiarity.¹³¹ Moreover, by assessing the added value of the EWS, Philipp Kiiver critically notes that national parliaments may always direct complaints to the initiator of EU legislation, even without the EWS, as, if they are willing to do so, EU institutions can always take into account the arguments raised by national parliaments.¹³²

An important issue in the functioning of the EWS is the eight-week deadline. While the scepticism depicting the eight-week time frame as insufficient did not prove to be

¹²⁶ See Peters at 71, questioning whether MPs as politicians will be able to refrain from assessing of the contents of the proposal.

¹²⁷ Cooper, ‘A ‘virtual third chamber’ for the European Union? National parliaments after the Treaty of Lisbon’, 449.

¹²⁸ A member of the Convention, Gisela Stuart brought a proposal to the Convention that aimed at combining the conclusions of the two working group reports. One of her proposals was establishing a ‘red card’ in addition to the procedure proposed by the working groups. The ‘red card’ would have taken place if the national parliaments reached a two-third threshold. See further Contribution by Ms Gisela Stuart, member of the Convention ‘The Early Warning Mechanism-putting it into practice’, CONV 540/03, 6.02.2003, at 3. This idea was rejected by the Praesidium as ‘too interventionist’. See Stephen Weatherill, ‘Competence creep and competence control’ (2004) 23 Yearbook of European Law 1, 44. Moreover, the mechanism of the ‘red card’ was seen as infringing the monopoly of initiative of the Commission that the Constitutional Treaty maintained as a principle. See Kiiver, ‘Some suppositions, propositions, tests and observations in light of the fate of the European Constitution’ at 141.

¹²⁹ Cooper, ‘A ‘virtual third chamber’ for the European Union? National parliaments after the Treaty of Lisbon’, 449.

¹³⁰ Xavier Groussot and Sanja Bogojević, ‘Subsidiarity as a Procedural Safeguard of Federalism’ in Loïc Azoulay (ed), *The question of competence in the European Union* (Oxford University Press 2014) at 238.

¹³¹ Bernhard Schima, ‘Die Subsidiaritätskontrolle durch die nationalen Parlamente nach dem Vertrag von Lissabon’ (2013) 68 Zeitschrift für öffentliches Recht, 373.

¹³² See Kiiver, ‘Some suppositions, propositions, tests and observations in light of the fate of the European Constitution’ at 141.

warranted,¹³³ as national parliaments managed to submit their reasoned opinions on time, it is, however, often criticised as too short by the practitioners – the national parliaments – themselves. As outlined during a House of Commons debate, it is unreasonable to expect that a parliament should ‘come to an informed view on compliance with subsidiarity within the eight-week time frame allotted for issuing a reasoned opinion without the benefit of an analysis by the Government.’¹³⁴

In this respect the COSAC 19th bi-annual Report of May 2013 indicates that 12 out of 32 parliaments/chambers responded that the eight-week period for internal parliamentary scrutiny of subsidiarity was not sufficient.¹³⁵ Six parliaments/chambers¹³⁶ stated that a 12-week period for internal parliamentary scrutiny of subsidiarity would be better. Two parliaments/chambers (the Hungarian Országgyűlés and the Cypriot Vouli ton Antiprosopon) specified that a ten-week period would be more appropriate, especially in the case of legislative proposals that bear significant economic or social importance and require more in-depth analysis. Some parliaments/chambers emphasised that a longer period would not mean a significant slowing down of the European legislative procedure (given its usual duration), but that it would provide enough time for the national parliaments to thoroughly scrutinise subsidiarity, and could lead to an improvement in the quality of the reasoned opinions. The Swedish Riksdag supported the view that a review of the current timescales available for subsidiarity checks is needed. According to the Riksdag, a longer time frame would make it easier for more parliaments/chambers to examine more proposals and would facilitate interparliamentary cooperation.

2.2 Current practice of the EWS

Against the negative expectations of the scholarship, which speculated that a ‘yellow card may never be triggered,’¹³⁷ national parliaments have shown two ‘yellow cards’ vis-à-vis Commission proposals since the entry into force of the Lisbon Treaty. National parliaments

¹³³ Groussot and Bogojević at 238.

¹³⁴ Issue raised by the Chair of the House of Commons European Scrutiny Committee, W. Cash, House of Commons Hansard Debates for 10 Feb 2014 on COM(2013)821, Column 673.

¹³⁵ COSAC, 19th Bi-annual Report on EU Practices and Procedures (May 2013) at 28.

¹³⁶ German *Bundestag*, Irish *Houses of the Oireachtas*, UK *House of Commons*, Czech *Senát*, Belgian *Sénat* and Dutch *Tweede Kamer*.

¹³⁷ Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 133. See also the oral evidence given by S. Hix in the House of Commons European Scrutiny Committee. House of Commons, European Scrutiny Committee, Thirty-third Report of Session 2007-08, Subsidiarity, National Parliaments and the Lisbon Treaty, 8.10.2008, Oral evidence Q 50-52.

have not yet managed to trigger an ‘orange card’ for any of the Commission proposals; hence the view of Lindseth that ‘[t]he high thresholds under both yellow and orange card procedures could pose significant obstacles to their formal use, thus undermining their likely impact’ remains partially true.¹³⁸ Yet, although rarely reaching necessary thresholds, national parliaments do send reasoned opinions within the EWS framework.

Article 9 of Protocol No. 2 obliges the Commission to publish an annual report on the application of Article 5 TEU. The analysis of the reports issued between 2010 and 2014 will be focused on three issues: the increase of the number of reasoned opinions; the spread of reasoned opinions, and the most and least active parliaments in the EWS.

The first conclusion that can be drawn from the Commission reports is that the number of reasoned opinions is increasing every year. While the beginnings were quite modest – in 2010, the Commission published 82 draft legislative acts, and national parliaments issued 34 reasoned opinions¹³⁹ – in the following years the numbers increased. For example, in 2011, the national parliaments issued 64 reasoned opinions;¹⁴⁰ in 2012, 70;¹⁴¹ and in 2013, 88¹⁴². The ‘yellow card’ threshold was reached on two occasions thus far: in 2012 concerning the Commission proposal on the right to strike; and in 2013 concerning the Commission proposal on the establishment of the European Public Prosecutor’s Office of the same year.

Second, the reports show also that the reasoned opinions spread unequally vis-à-vis Commission proposals; many Commission proposals receive a single reasoned opinion. However, each year there was a group of proposals that received a significant number of opinions, though not enough to trigger a ‘yellow card.’ For example, the most commented proposals in 2010¹⁴³ were the Seasonal Workers Directive,¹⁴⁴ the Deposit Guarantee Schemes Directive,¹⁴⁵ and the provisions on Food Distribution to the Most Deprived Persons in the Union.¹⁴⁶ In 2011, national parliaments issued the greatest number of reasoned opinions

¹³⁸ Lindseth at 241.

¹³⁹ European Commission, Report from the Commission on subsidiarity and proportionality (18th report on Better Lawmaking covering year 2010), COM(2011) 344, at 4.

¹⁴⁰ European Commission, Report from the Commission on subsidiarity and proportionality (19th report on Better Lawmaking covering the year 2011), COM(2012) 373, at 4.

¹⁴¹ European Commission, Report from the Commission on subsidiarity and proportionality (20th report on Better Lawmaking covering the year 2012), COM(2013) 566, at 3.

¹⁴² European Commission, Report from the Commission on subsidiarity and proportionality (21st report on Better Lawmaking covering the year 2013), COM(2014) 506, at 4.

¹⁴³ Commission Report COM (2011) 344, p. 11.

¹⁴⁴ COM(2010) 379.

¹⁴⁵ COM(2010) 368.

¹⁴⁶ COM(2010) 486.

(nine) with regard to the proposals for the Common Consolidated Corporate Tax Base (CCCTB)¹⁴⁷, the temporary reintroduction of border control at internal borders in exceptional circumstances¹⁴⁸ (six reasoned opinions) and the Common European Sales Law¹⁴⁹ (five reasoned opinions).¹⁵⁰ In 2012, the ‘yellow card’ right to strike proposal raised 12 reasoned opinions, and was followed by five reasoned opinions for the Commission proposal¹⁵¹ on the Fund for Aid to the Most Deprived.¹⁵² In 2013, the proposal that received the most comments was the ‘yellow card’ trigger, the EPPO proposal, with 13 reasoned opinions; the draft directive establishing a framework for maritime spatial planning and integrated coastal management¹⁵³ received nine reasoned opinions; while the new Tobacco Products Directive¹⁵⁴ and the draft regulation on market access to port services and financial transparency¹⁵⁵ triggered seven each.¹⁵⁶

Third, the most active parliament throughout 2010-2014 was the Swedish Riksdag, which issued a total of 43 opinions in four years with a record 20 in 2012. Yet its number of reasoned opinions visibly decreased in 2013, to a more moderate 9 (although this is still the highest of all chambers during that calendar year). Other particularly active chambers include the French Sénat (15), the Luxembourg Chambre des Députés (15) and the UK House of Commons (14). The chambers with the lowest number of reasoned opinions included smaller Member States such as the Državni svet in Slovenia, which issued zero opinions or chambers in Estonia and Hungary, which issued one each.

3 The subsidiarity review from the perspective of EU institutions

In order to give a full overview of the design of the subsidiarity review, the role played by EU institutions also needs to be explored.

¹⁴⁷ COM(2011) 121.

¹⁴⁸ COM(2011) 560.

¹⁴⁹ COM(2011) 635.

¹⁵⁰ Cf. Commission report COM(2012) 375.

¹⁵¹ COM(2012) 617.

¹⁵² See further Commission report COM(2013) 566.

¹⁵³ COM(2013) 133.

¹⁵⁴ COM(2012) 788.

¹⁵⁵ COM(2013) 296.

¹⁵⁶ Cf. Commission report COM(2014) 506.

3.1 The European Parliament

The EP comes into play in the subsidiarity review mechanism if the national parliaments trigger an ‘orange card.’ As I outlined in Section 2 of this chapter, according to Article 7(3) (b) of Protocol No. 2, if the majority of the votes cast in the EP before the end of first reading state that the proposal is not compatible with the principle of subsidiarity, it will result in a rejection of the legislative proposal. It seems that the majority of the votes cast under the ‘orange card’ does not make it easier for the EP to dismiss a Commission proposal, as the same majority (a simple majority) is needed in the first reading during the ordinary legislative procedure in order to adopt its position (Art. 294(3) TFEU).¹⁵⁷ However, the phrase used in Article 7 of Protocol No. 2 ‘before concluding the first reading’ seems to mean that the vote on the compatibility of the proposal will take place separately, or at least before, the EP votes on the first reading.

Moreover, the possibility of stopping the analysis of the draft legislative act offered by Protocol No. 2 may help the EP to dismiss Commission legislative drafts that are unwanted for reasons other than subsidiarity before the end of the first reading. However, this will depend upon how the EP formulates its objections against the act and if it reaches beyond the strict assessment of subsidiarity. Furthermore, for the Parliament ‘it is not the veto that is important, but the shadow of the veto’ helping to state its preferences before other institutions more clearly.¹⁵⁸

Nonetheless, as the ‘orange card’ has never been triggered so far, it is worth looking at other options for national parliaments to reach the EP. The EP receives and considers the contributions of national parliaments officially transmitted by a national parliament to the EP.¹⁵⁹ These contributions are then forwarded to the committee responsible for the subject matter in question. With regard to subsidiarity specifically, Rule 42 of the EP Rules of Procedure focuses on the examination of proposals in this respect. The EP forwards the

¹⁵⁷ Barrett argues that ‘(...) under the ordinary legislative procedure the EP has more difficulty in blocking legislation. It must act by an absolute majority of its component members in order to prevent a proposal from being adopted’. The reference here is made to the absolute majority needed in the second reading to reverse the position of the Council (Art. 294.7 b TFUE). However, as Art 7(3) b of Protocol No. 2 refers only to the first reading, a comparison with the first reading in the ordinary legislative procedure seems to be more reasonable. Gavin Barrett, “The king is dead, long live the king”: The recasting by the Treaty of Lisbon of the provisions of the Constitutional Treaty concerning national parliaments’ (2008) 33 *European Law Review* 66, 81.

¹⁵⁸ Jacques Ziller, ‘French Reactions to the Treaty Establishing a Constitution for Europe: from Constitutional Welcome to Popular Rejection’ in Anneli Albi and Jacques Ziller (eds), *European Constitution and National Constitutions : Ratification and Beyond* (Kluwer Law International 2007) at 106.

¹⁵⁹ European Parliament, Rules of Procedure, Rule 42(4).

reasoned opinions of national parliaments to a committee responsible for the subject matter and, for information, to the committee responsible for respect of the principle of subsidiarity (Committee on Legal Affairs).¹⁶⁰ The committee at stake should not finalise its vote on a proposal before the expiry of the eight week deadline.¹⁶¹ Moreover, if the reasoned opinions of national parliaments meet the ‘yellow card’ threshold, the Rules of Procedure oblige the EP to wait for the decision of the sponsor of the criticised proposal.¹⁶² Nonetheless, the committee responsible for the subject matter plays the decisive role when the national parliaments trigger the ‘orange card.’ The relevant committee, after pondering the reasoned opinions of the national parliaments and of the Commission and hearing the views of the Committee on Legal Affairs, may advise the EP to reject the proposal due to a subsidiarity violation, or recommend amendments to the EP with respect of the principle of subsidiarity.¹⁶³ The relevant committee should attach an opinion given by the Committee on Legal Affairs to its opinion.¹⁶⁴ Next, the EP debates and votes upon the committee’s recommendation.¹⁶⁵ The legislative procedure is closed if a majority of the votes cast are in favour of adopting the recommendation to reject the proposal. If the EP does not reject the proposal, the legislative procedure continues, taking on board the EP’s recommendations.

Moreover, the parliamentary questions¹⁶⁶ present another avenue for MEPs to intervene where national parliaments signalled a subsidiarity violation, but did not manage to trigger an ‘orange card,’ which may ultimately involve the EP. Whereas in some cases, MEPs asked about the subsidiarity review mechanism and its outcomes in general terms,¹⁶⁷ some

¹⁶⁰ European Parliament, Rules of Procedure, Rule 42(3).

¹⁶¹ European Parliament, Rules of Procedure, Rule 42(4). The only exception are cases of urgency as indicated in Art 4 of Protocol No. 1.

¹⁶² European Parliament, Rules of Procedure, Rule 42(5).

¹⁶³ European Parliament, Rules of Procedure, Rule 42(6).

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ European Parliament, Rules of Procedure, Rule 130.

¹⁶⁷ See, for example, the question of MEP J.Ferreira to the Commission of 22.02.2012 on the assessment of the mechanism for subsidiarity monitoring, E-002099/2012, OJ C 110 E, 17/04/2013, question of MEP I.B.Barandica to the Commission of 24.10.2011 on the role of the Committee of the Regions in the EWS, E-00955/2011, OJ C 168 E, 14/6/2012, question of MEP R.J.Atondo to the Commission of 29.09.2010 on the application of the subsidiarity principle, E-7782/2010, OJ C 243 E, 20/08/2011, question of MEP E.-B. Svensson to the Commission of 15.03.2011 on the opinions from national parliaments, E-002425, OJ C 294 E, 6.10.2011, question of MEP M. Repo to the Commission of 27.09.2012 on the consequences of the withdrawal of the Monti II regulation, E-008617/2012, question of MEP J. Steinruck to the Commission on the EWS, E-011171/2010, OJ C 279 E, 23/09/2011, question of MEP B. Madlener to the Commission of 27.06.2012 on the opinion of the Dutch parliament on the White paper on pensions, E-006452/2012; question of MEP C. Davies, OJ C 56 E, 27/02/2014 on the application of the subsidiarity principle and the reply of the Commission OJ C 56 E, 27/02/2014; question of MEP M. Theurer to the Commission on the application of the EWS and the reply of the Commission OJ C 46 E, 18/02/2014; question of MEP R. Atkins to the Commission on the

questions were more specifically asking with regard to specific proposals where a national Parliament issued a reasoned opinion.¹⁶⁸ For example, the French MEP Rachida Dati underlined that with regard to the Commission proposal on roadworthiness tests, the French parliament has issued a reasoned opinion outlining a violation of the subsidiarity principle, and drafted a report on the lack of adequate subsidiarity justifications in the Commission's proposals.¹⁶⁹ The MEP, thus, asked the Commission, if it would take the concerns of the French Senate into account.¹⁷⁰ In its reply, the Commission highlighted that the compatibility of proposals with the subsidiarity principle is an 'important subject, which is always thoroughly considered when proposing legislative initiatives' and relied on its Policy Orientations on Road Safety 2011-2020 and impact assessment to justify its proposal.¹⁷¹ The use of parliamentary questions to inquire on the use of the EWS appears to represent a good avenue for MEPs to further underline the concerns of national Parliaments with regard to subsidiarity.¹⁷²

The EP shows awareness of national parliaments' activity with regard to subsidiarity assessments. In its resolution of 13 September 2012 on the Commission report on Better legislation, the EP addressed the issue of subsidiarity control by national parliaments.¹⁷³ The EP welcomed the involvement of national parliaments in the EU legislative process, remarking, however, that only a small number of national parliaments' opinions concerned

application of subsidiarity by the ECJ and the reply of the Commission OJ C 216, 09/07/2014; question of MEP C. Davies of 20.01.2014 on the application of the subsidiarity principle and Commission reply of 17.02.2014, E-000459/2014.

¹⁶⁸ See for example question of MEP D. Vlasto to the Commission on the respect for the subsidiarity principle as regards VAT on equestrian activities (concerns reasoned opinion of the French Senate), E-009190/2011, OJ C 154 E, 31/05/2012 and the answer of the Commissioner M. Smeta of 28.11.2011, OJ C 154 E, 31/05/2012; question of MEPs L. Fontana & M. Salvini to the Commission of 19.02.2013 on the violation of the subsidiarity and proportionality by the proposal for a directive on tobacco products (concerns reasoned opinion of the Italian Senate), E-001742-13 and the answer given by Mr Borg on behalf of the Commission of 4.04.2013, E-001742/2013; question of MEP P. van den Kammen on the Commission proposal on the maritime spatial planning and integrated coastal management (concerns reasoned opinions of the parliaments of Poland, Sweden, Germany, Ireland, Romania, Belgium, Finland, Lithuania and the Netherlands), OJ C 206, 02/07/2014 and the answer given by Ms Damanaki on the behalf of the Commission, OJ C 206, 02/07/2014; question of MEP A. Zijlstra of 6.02.2014 on the EPPO proposal and the Commission reply of 29.04.2014, E-001249-14; question of MEP I. Gräßle of 6.12.2014 on the EPPO and the Commission reply of 10.02.2014, E-013922/2013; question of MEP A. Zijlstra of 18.02.2014 on the launch of enhanced cooperation for the EPPO and the Commission reply of 14.04.2014, E-001878-14.

¹⁶⁹ Question of MEP Rachida Dati to the Commission of 30.10.2012 on the Commission proposal for roadworthiness tests, E-009914-12.

¹⁷⁰ Ibid.

¹⁷¹ Answer given by Mr Kallas on behalf of the Commission, 21.01.2013, E-009914/2012.

¹⁷² It is however worth noting that it is the MEP originating from the Member State that issued a reasoned opinion that addresses the question in this regard to the Commission.

¹⁷³ European Parliament resolution of 13 September 2012 on the 18th report on Better legislation - Application of the principles of subsidiarity and proportionality (2010) (2011/2276(INI)), points 5-21.

subsidiarity violations. Moreover, with regard to the first ‘yellow card,’ the EP urged the Commission to review the draft taking into account the position of national parliaments. Additionally, the EP mentioned the lack of subsidiarity justification in Commission proposals, which national parliaments often highlight in their reasoned opinions. Interestingly, the EP resolution pressed for a review of the eight-week deadline for subsidiarity review. Finally, the EP underlined the role of regional parliaments with legislative powers, advising national parliaments to consult them with regard to subsidiarity concerns, and advising the Commission to take into account their role in its annual report on subsidiarity and proportionality.

3.2 The Council

In the Council, the Committee of Permanent Representatives (COREPER) ensures that institutional principles are complied with.¹⁷⁴ The participation of the Council in the subsidiarity review itself is foreseen first in Article 6(2) of Protocol No. 2. Specifically, the President of the Council forwards the reasoned opinions to the governments of those Member States, if a draft legislative act originates from a group of Member States.¹⁷⁵ The second function of the Council under Protocol No. 2 is expressed in Article 7(3)(b) of Protocol No.2, within the ‘orange card.’

Under the provisions of the Treaty of Lisbon, the Nice Treaty’s ‘qualified majority’ voting will no longer rely on weighted votes attributed to each Member State (260 votes cast in favour out of 352), but, starting from 1st November 2014 it will contain two thresholds (‘double majority’): 55% of the number of Member States (but not less than 15), and at least 65% of the Union’s population (Article 16 TEU). According to the transitional provisions, the new method will be brought fully into force from 1 April 2017; in the interim, a Member State can request the application of the ‘qualified majority’ model, emanating from the Treaty of Nice. In the ordinary legislative procedure, a qualified majority is required in the first reading (Article 16 TEU in connection with Article 294(4) TFUE). In the subsidiarity review,

¹⁷⁴ Council Decision 2009/937/EU, OJ L 325, 11.12.2009, p. 35, See Article 19(1)(a) stating that Coreper in its responsible for preparing the work of all the meetings of the Council and for carrying out the tasks assigned to it by the Council has to ensure consistency of the European Union's policies and actions and see if the principles of legality, subsidiarity, proportionality and providing reasons for acts are observed. This provision is, however, not new: the Council was under the same obligation under the previous rules of procedure (see Council Decision 2006/683/EC, Euratom, OJ L 285, 15.09.2006, p. 47).

¹⁷⁵ In 2010 in three cases: Directive on the Rights to Interpretation and to Translation in Criminal Proceedings (2010/0801 (COD)), Directive on the European Protection Order (2010/0802 (COD)) and Directive on European Investigation Order (2010/0817 (COD)). See Commission report COM (2011) 344, p. 6.

in order to stop the legislative procedure, which must be done before the end of the first reading, a majority of 55% of the Member States in the Council is required to declare the draft as incompatible with the principle of subsidiarity. When compared to the Nice Treaty ‘qualified majority’ rules, which demanded that a majority of Member States vote in favour (at least 15 out of 28), the request that 55% of Member States vote in favour, in fact, also demands a similar majority of at least 15 Member States.¹⁷⁶ In addition, the ‘orange card’ discards the requirement of 65% representation in the Council, which seems to strengthen the small Member States.¹⁷⁷ The reason behind this might be that because the ‘orange card’ demands at least a majority of the votes of the national parliaments, and because the Council members would probably follow their parliaments – obviously depending upon national systems – it should not be made harder for the Council to state subsidiarity violation.

In contrast to the Council, the EP has always been perceived as a more integration-friendly institution (and thus probably more in favour of the exercise of a competence by the EU) than the Council. Hence, for the EP, the subsidiarity review may not be an advantage due to its pro-integrationist character, implying the protection of the EU competence, but as the ‘orange card’ presents an alternative: a majority of the votes cast in the EP or 55% of Council votes, the last word will belong to the Council, if the EP states the compatibility with the principle of subsidiarity.

3.3 The Committee of the Regions

One of the novelties in the text of Article 5(3) TEU is that it distinguishes between the different levels of Member State action: central, regional and local, in comparison to the previous formulation of this provision, which referred the Member States in general terms. Moreover, Article 6(1) of Protocol No. 2 provides that in the EWS, national parliaments may consult, where appropriate, regional parliaments with legislative powers. Further, Article 8 of Protocol No. 2 provides for the role of the Committee of the Regions in the subsidiarity

¹⁷⁶ Before 1 November 2014 the qualified majority will be counted according to the procedure indicated in Protocol No. 36, which is 255 votes in favour meaning that already 13 (out of 27) Member States with the highest number of votes could form it. Hence the argument of Barrett that the ‘orange card’ makes it harder for the Council than for the EP to block a proposal seems to work in that scenario, but not under the ‘double majority’ rules. See Barrett at 81. T. Hartley argues that in the case of ‘orange card’ the Council does not vote by ‘qualified majority’ and that each Member State has one vote and at least 16 out of 28 must vote against the draft act. Cf. Trevor C. Hartley, *The Foundations of European Union Law* (OUP 2014) at 126.

¹⁷⁷ Christian Bickenbach, ‘Das Subsidiaritätsprinzip in Art. 5 EUV und seine Kontrolle’ [2013] *Zeitschrift Europarecht* 523, 532.

review. Finally, the Committee of Regions has a ‘semi-privileged’ standing against legislative acts in cases where the TFEU provides for consultation with the Committee.¹⁷⁸

Despite the above, these regions-friendly provisions, first foreseen in the Constitutional Treaty were seen as insufficient to ‘provoke acceptance of a formal institutional monitoring role conferred on sub-national actors.’¹⁷⁹ In addition, the role of the Committee of Regions is arguably rather limited in the scrutiny of the subsidiarity principle, due to the practical limitations such as lack of legislative powers, diverse methods of members appointment, and - in direct connection to the EWS – the lack of a possibility to raise a ‘yellow’ or ‘orange card.’¹⁸⁰ The Committee of the Regions may, however, adopt opinions, which can concern Commission proposals and other acts regarding their compatibility with the subsidiarity and proportionality principles. For example, in 2013, the Committee of the Regions adopted 72 opinions, 72% of which referred to the subsidiarity principle,¹⁸¹ while 36% expressed the position of the Committee on the compliance with the subsidiarity principle.¹⁸²

While Chapter 3 delves into the ways for the regional parliaments to participate in the EWS through their national parliaments, this section will briefly look into how the Committee of the Regions manages the subsidiarity review. In 2007, even before the entry into force of the Lisbon Treaty, the Committee of the Regions began operating a Subsidiarity Monitoring Network (SMN) for the ‘exchange of information between local and regional authorities in the European Union and the Union level regarding various documents and legislative and political proposals from the European Commission which, once adopted, will have a direct impact on these authorities and the policies for which they are responsible.’¹⁸³ Network partners (parliaments and governments of regions with legislative powers, local and regional authorities without legislative powers and local government associations in the European Union; the national delegations to the Committee of the Regions) may submit their assessments in ‘open consultations.’ These consultations concern all political or legislative documents that are the subject of a Committee of the Regions opinion.¹⁸⁴ Another venue is

¹⁷⁸ Stephen Weatherill, ‘Finding a Role for the Regions in Checking EU’s Competence’ in Stephen Weatherill and Ulf Bernitz (eds), *The role of regions and sub-national actors in Europe* (Hart 2005) at 151.

¹⁷⁹ Ibid at 150.

¹⁸⁰ Adam Cygan, ‘Regional governance, subsidiarity and accountability within the EU’s multi-level polity’ (2013) 19 *European Public Law* 161, 167.

¹⁸¹ European Parliament, Rules of Procedure, Rule 51(2).

¹⁸² Committee of Regions, Subsidiarity Annual Report 2013 at 9.

¹⁸³ <https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx>.

¹⁸⁴ <https://portal.cor.europa.eu/subsidiarity/Activities/Pages/Openconsultations.aspx>

‘targeted consultations,’ where the Committee of the Regions’ rapporteur on a specific EU act invites the network partners to comment on subsidiarity and proportionality.¹⁸⁵ The opinions of the network partners might be submitted in form of ‘standard assessment grids’ or ‘tailored questionnaires.’¹⁸⁶

The core of the SMN’s functioning is its subnetwork REGPEX, which regional parliaments may use ‘as a tool for selecting priorities for subsidiarity monitoring’ by publishing and sharing their opinions before the expiry of the eight week period.¹⁸⁷ REGPEX was launched in February 2012.¹⁸⁸ In 2013, 66 contributions were submitted, with the most active bodies being the Thüringen State Parliament, the Emilia Romagna Regional Legislative Assembly, the Austrian Bundesrat, the Austrian State Governor's Conference and the Baden-Württemberg State Parliament.¹⁸⁹

Finally, in 2013, the Committee of the Regions launched its first Subsidiarity Work Programme, which included five priority areas selected from the Commission Working programme for a subsidiarity review.¹⁹⁰ New proposals were also selected for 2014.

4 The ‘Barroso initiative’

In contrast to the previous Commissions, the Commission presided by Barroso gave more priority to relations with national parliaments in EU policy-making. In February 2005, the Commission adopted a new approach to the relations with national parliaments.¹⁹¹ The objectives included, *inter alia*, visits to national parliaments and drafting an annual report on relations with national parliaments.¹⁹² Furthermore, following on from the European Council declaration on ‘the ratification of the Treaty establishing a Constitution for Europe’ of 18 June 2005 calling for a ‘reflection period’ after the failed French and Dutch referenda on the Constitutional Treaty, the Commission proposed ‘Plan D’ (for democracy, dialogue and

¹⁸⁵ <https://portal.cor.europa.eu/subsidiarity/activities/Pages/Targetedconsultations.aspx>

¹⁸⁶ See examples at: <https://portal.cor.europa.eu/subsidiarity/thesmn/Pages/default.aspx>.

¹⁸⁷ Committee of Regions, Subsidiarity Annual Report 2012, at 5. For REGPEX see <https://portal.cor.europa.eu/subsidiarity/regpex/pages/default.aspx>

¹⁸⁸ Ibid.

¹⁸⁹ Ibid at 8.

¹⁹⁰ <https://portal.cor.europa.eu/subsidiarity/news/Pages/CoR-Subsidiarity-Work-Programme-2013.aspx>.

¹⁹¹ Vice-Commissioner Wallström presented to the Commission College 10 objectives on relations with national parliaments. See Report from the Commission, Annual Report 2005 on the Relations with National Parliaments, 22.3.2006, SEC(2006)350.

¹⁹² Ibid at 4. On the outcome of these visits see the first report published on the relations with national parliaments: Report from the Commission, Annual Report 2006 on the relations between the Commission and the national parliaments, Memo to the Members of the IRG, SP (2007) 2202/4, Brussels, 8.5.2007, [http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/sp\(2006\)2202.pdf](http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/docs/sp(2006)2202.pdf).

debate), in order ‘to stimulate a wider debate between the European Union’s democratic institutions and citizens.’¹⁹³ In 2006, the Commission presented a developed ‘Plan D’ – a ‘Citizens’ Agenda’.¹⁹⁴ The Citizens’ Agenda foresees a commitment to the respect of the subsidiarity principle, which means that the Commission will work with Member States and their national parliaments.¹⁹⁵ Specifically, the document foresees a closer involvement of national parliaments in the ‘development and execution of European policy’. The increased participation of national legislatures was, in the view of the Commission, ‘a step to ‘make European policies more attuned to diverse circumstances and more effectively implemented.’¹⁹⁶ As a consequence, the Commission committed itself to forward all new legislative proposals and consultation papers directly to national parliaments, with an invitation to react, in order to enhance the policy making process. This initiative is named the ‘Barroso initiative,’ after the President of the Commission at the time, and is often also referred to as ‘political dialogue.’¹⁹⁷ Jančić defines the ‘Barroso initiative’ as ‘a broad political dialogue between the Commission and the national parliaments of the Member States on all aspects of the former’s political agenda.’¹⁹⁸

The ‘Barroso initiative’ was definitely an improvement in the information and participation rights of national parliaments, which at that point in time relied on their national governments. Political dialogue limited the dependence of national parliaments on their respective governments.¹⁹⁹ The Amsterdam Protocol on national parliaments provided only that the consultation documents be forwarded ‘promptly’ by the Commission, whereas the legislative proposals be ‘made available in good time’ by the government.²⁰⁰ Nonetheless, it was clear for the Commission that the balance within ‘the institutional triangle’ – the

¹⁹³ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. The Commission’s contribution to the period of reflection and beyond: Plan-D for Democracy, Dialogue and Debate, 13.10.2005, COM(2005) 494 at 2.

¹⁹⁴ Communication from the Commission to the European Council. A Citizens’ Agenda. Delivering Results for Europe, 10.5.2006, COM(2006) 211, 2-3.

¹⁹⁵ Ibid at 8.

¹⁹⁶ Ibid at 9.

¹⁹⁷ See, however, that Jančić traces the ‘Barroso initiative’ to 2001 and the White Paper on EU governance. Davor Jančić, ‘The Barroso Initiative: Window Dressing or Democracy Boost’ (2012) 8 Utrecht Law Review 78, 79.

¹⁹⁸ Ibid, 80.

¹⁹⁹ Cygan, *Accountability, parliamentarism and transparency in the EU* at 115.

²⁰⁰ Treaty of Amsterdam, Protocol on the Role of National Parliaments in the European Union, Art 1 and 2.

Commission, the EP and the Council – is not affected by the new approach towards national parliaments.²⁰¹

The participation of national parliaments in the political dialogue is differentiated. Taking into account the same time period as that utilised in the case of the EWS (2010-2013), the number of opinions that the Commission received is significantly higher. The number of the received opinions was the following: 387 in 2010;²⁰² 558 in 2011;²⁰³ 593 in 2012;²⁰⁴ and 553 in 2013.²⁰⁵

The most active parliament in the ‘Barroso initiative’ has been the Portuguese Parliament.²⁰⁶ The success of this body has been explained as a consequence of a new parliamentary procedure in 2006, allowing the chamber to pass written opinions on EU issues which touched upon its exclusive legislative competence and give them a practical dimension by forward them to the Commission within the newly established political dialogue.²⁰⁷

Other consistently active participants of the political dialogue include the Italian and Czech Senates, the German Bundesrat, the Swedish Riksdag and the Romanian Chamber of Deputies.²⁰⁸ On the other side of the spectrum were the Estonian, Hungarian and Slovenian parliaments, all often showing no activity at all.

There are five main differences between the ‘Barroso initiative’ and the EWS: the type of acts under the scrutiny, the time frame, the addressees of opinions, the scope of the review and the fact there is a positive or negative assessment. First, the opinions issued within the political dialogue are not limited to EU draft legislative acts, but also apply to non-legislative documents: consultation documents (green and white papers, communications or annual

²⁰¹ European Commission, Annual Report 2005 on the Relations with National Parliaments, SEC(2006)350 at 2.

²⁰² European Commission, Report From the Commission, Annual Report 2010 on Relations between the European Commission and National Parliaments, 10.6.2011, COM(2011)345, at 6.

²⁰³ European Commission, Report From the Commission, Annual Report 2011 on Relations between the European Commission and National Parliaments, 10.07.2012, COM(2012)375, at 5.

²⁰⁴ European Commission, Report From the Commission, Annual Report 2012 on Relations between the European Commission and National Parliaments, 30.7.2013, COM(2013)565, at 4.

²⁰⁵ European Commission, Report From the Commission, Annual Report 2013 on Relations between the European Commission and National Parliaments, 5.8.2014, COM(2014)507, at 5.

²⁰⁶ 2010: 106 opinions, 2011: 183 opinions, 2012: 226 opinions, 2013: 191 opinions within the political dialogue, excluding the reasoned opinions.

²⁰⁷ Jančić, 89.

²⁰⁸ While the position of these parliaments differs in the ranking each year, they remain on the top position in 2010-2013 Commission reports. See however that the Romanian chamber issued 0 opinions in 2010, but 40 in 2011.

legislative programmes) can be commented on by national parliaments.²⁰⁹ Second, whereas Protocol No. 2 rigidly sets the eight week deadline for reasoned opinions, the ‘Barroso initiative’ can be triggered at any time during the legislative process. Third, concerning the addressees of opinions, while Protocol No. 2 stipulates that the reasoned opinion is forwarded to the Commission and the EU legislator, the ‘Barroso initiative’ is much more limited, as it operates only between national parliaments and the Commission.²¹⁰ Fourth, regarding the scope of the review, the ‘Barroso initiative’ opinions may assess the conferral, subsidiarity and proportionality principles, political accountability (the duty to give adequate justification for the action), as well as other political and legal aspects of Commission proposals by examining their substance,²¹¹ in contrast to the subsidiarity focused EWS.²¹² Finally, Article 6 of Protocol No. 2 provides that a reasoned opinion should focus on why the draft legislative proposal is not compatible with the subsidiarity principle. With regard to the ‘Barroso initiative,’ the assessment of an act can be both negative, as well as positive, stating that no violation of the subsidiarity principle is at stake. In addition to these differences, Jančić points out the fact that while the EWS is anchored in Protocol No. 2, the ‘Barroso initiative’ has an informal character, and could be abolished by the Commission at any time.²¹³

The opinions of national parliaments within the political dialogue receive responses from the Commission, similar to reasoned opinions in cases where no ‘yellow’ or ‘orange’ card has been triggered. This is a consequence of the responsibility that the Commission undertook when the Lisbon Treaty was entering into force.²¹⁴ Moreover, at that point, the Commission asked national parliaments to ‘distinguish in their opinions as far as possible between subsidiarity aspects and comments on the substance of the proposal, and to be as clear as possible as regards their assessment on a proposal’s compliance with the principle of subsidiarity.’²¹⁵ In fact, as Jančić points out, national parliaments do not send two separate

²⁰⁹ See for example opinions of the German Bundesrat, the Romanian Chamber of Deputies and the Swedish Riksdag to the Commission White Paper ‘Agenda for Adequate, Safe and Sustainable Pensions’ COM(2012)55 available at <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20120055.do#dossier-COM20120055> or the opinion of the Swedish Riksdag on the Commission Work Programme for 2014, COM(2013)739, available at: <http://www.ipex.eu/IPEXL-WEB/dossier/document/COM20130739.do>.

²¹⁰ Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 23.

²¹¹ Jančić at 80-81.

²¹² See Chapter 2.

²¹³ Jančić at 83.

²¹⁴ Letter of President Barroso and Vice-President Wallström of 1 December 2009: Practical arrangements for the operation of the subsidiarity control mechanism under Protocol No. 2 of the Treaty of Lisbon, p. 5.

²¹⁵ Letter of Barroso and Wallström on Practical Arrangements, p. 4.

opinions on Commission proposals.²¹⁶ In truth, as it will be shown in this thesis at several points, reasoned opinions contain comments on different aspects of the proposals, not exclusively on subsidiarity. This approach is not problematic *per se*, as long as a ‘yellow’ or ‘orange’ card is not triggered. When no appropriate threshold has been reached, the Commission will reply to national parliaments’ reasoned opinions in the political dialogue in any case. Yet, when one of the ‘cards’ is triggered, the content of the reasoned opinion will matter, as they should address only the subsidiarity compliance of Commission proposals. Because the Commission ‘invited’ national parliaments to differentiate between subsidiarity and non-subsidiarity arguments, the Commission must have assumed that opinions invoking very diverse arguments would arrive. In this way, the Commission has given national parliaments a ‘free hand’ in designing their opinions. Yet, the Commission also created a condition, stipulating that the received opinions would undergo a ‘political assessment’ on the part of the Commission.²¹⁷ Hence, if a parliament proceeds with a broad scrutiny of an EU legislative proposal, it should be aware of the ‘political assessment’ conducted by the Commission after the deadline passes.

Turning to the question ‘does the ‘Barroso initiative’ have a visible impact at the EU level?’ The Commission itself reports that ‘[a]s regards the improvement of policy formulation, it is true that it might not always be easy to measure the concrete impact of national Parliaments’ opinions on a given final legislative act.’²¹⁸ Yet, in the early years of the political dialogue in a few cases, an influence on the EU legislative process was observed.²¹⁹ Looking at more recent data, the reactions to the proposal for the European Citizens’ Initiative show that the political dialogue provided the EU legislators with an option that was retained in the final

²¹⁶ Jančić at 83. Yet, see an exception in the case of the Romanian Chamber of Deputies which issued both a reasoned opinion and an opinion within the political dialogue on the Commission proposal for a Regulation of the European Parliament and of the Council on measures to reduce the cost of deploying high-speed communications networks, COM(2013) 147. In the reasoned opinion of 29.05.2013, the chamber claims subsidiarity violations due to the choice of the legal form, insufficiency of impact analysis and consultations on the proposal and lack of convincing economic added value of the proposal. On the contrary, the opinion within the political dialogue of 29.05.2013, although also questioning the legal form and insufficient impact assessment, goes into its substance and criticises among other the definitions used in the proposal; lack of reference to the owners of plots of land for whom the regulation implies significant costs; and the lack of consideration of particularities of the rural areas, for which Romania and other Member States such as Finland have a special interest.

²¹⁷ ‘After the deadline has expired, the Commission will provide a political assessment of the files for which the threshold has been reached and confirm the triggering of the subsidiarity control mechanism.’ See Letter of Barroso and Wallström on Practical Arrangements, p. 5.

²¹⁸ Report from the Commission, Annual Report 2009 on Relations between the European Commission and National Parliaments, 2.6.2010, COM(2010) 291, at 9.

²¹⁹ Jančić, 85.

text.²²⁰ In this case, the minimum number of Member States from which signatories of citizens' initiative must come was lowered and the one-year period for collecting signatures was established, reflecting the views expressed in the political dialogue.²²¹ This example, which in fact focuses on the substance of the proposal, proves that the political dialogue presents a valuable alternative for addressing non-subsidiarity related issues relating to Commission proposals in the EWS.

5 The EWS in Inter-parliamentary Cooperation

The EWS does not operate in a vacuum. It must be viewed against the background of inter-parliamentary cooperation in general. From the perspective of the EWS, the main reason is that some coordination between national parliaments is necessary in order to reach the Protocol No. 2 thresholds, as the yellow cards triggered thus far have shown. Beyond that, inter-parliamentary cooperation, in which the European Parliament also participates, may raise the awareness of MEPs for the contributions and reasoned opinions of national parliaments.

Inter-parliamentary cooperation is also anchored in EU primary law. The Maastricht Treaty incorporated two declarations: No 13 'on the role of national parliaments in the European Union' and No 14 'on the Conference of the Parliaments.' The first declaration called for greater involvement of national parliaments in EU affairs, especially through the exchange of information and regular meetings between national parliaments and the EP. The other declaration proposed that the EP and the national parliaments should meet as a Conference of the Parliaments (or in the form of 'Assises')²²² as a consultative body on the 'main features of the European Union.' The Presidents of the Council and of the Commission were to report on the state of the Union to the parliamentary conference. The Amsterdam Protocol on 'the role of national parliaments in the European Union' elaborated on the Conference (now as the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union – COSAC), granting it specific functions.²²³ First, COSAC's contributions on

²²⁰ Proposal for a Regulation of the European Parliament and the Council on the citizens' initiative, COM(2010) 119.

²²¹ Report from the Commission, Annual Report 2010 on Relations between the European Commission and National Parliaments, 10.6.2011, COM(2011) 345, at 7.

²²² The first and only meeting of the Assises was held just before the Maastricht IGC in November 1990 with the aim to discuss the future development of the Communities.

²²³ See criticism of this protocol with regard to the role of COSAC in Andreas Maurer, 'National Parliaments in the European Architecture: From Latecomers' Adaptation Towards Permanent Institutional Change?' in Andreas

legislative acts and other initiatives in the area of freedom, security and justice with a direct impact on the rights and freedoms of individuals should inform the EP, the Council and the Commission. Second, COSAC was competent to alert these institutions about its own contributions concerning: the ‘legislative activities of the Union’, in particular with regard to the subsidiarity principle; the area of freedom security and justice; and fundamental rights. However, the positions of COSAC did not have a binding force on national parliaments and were not prejudicial to their position. Under the Lisbon Treaty, in Protocol No. 1, inter-parliamentary cooperation is directly mentioned (Article 9). The Lisbon Protocol does refer again to the Conference of Parliamentary Committees for Union Affairs.²²⁴ The role of the conference is further seen as promoting the exchange of information and best practices, with a new function of organisation of inter-parliamentary conferences, in particular in the area of common security and defence policy (Article 10). Similarly to the position under the Amsterdam Treaty, the contributions of the conference have no binding force on national parliaments.

In general terms, Crum and Fossum observe a growing trend of cooperation within the ‘multilevel parliamentary field’ encompassing national and supranational parliamentary institutions participating in the EU decision-making process.²²⁵ Crum and Fossum positively assess the inter-parliamentary engagement; ‘parliaments are increasingly oriented to one another; each is becoming an intrinsic part of the others’ operating environment.’²²⁶ The existing networks can be divided according to bilateral – multilateral and formal – informal lines.²²⁷ From the perspective of this chapter, the most important are the multilateral ones, including formal networks such as the EU Speaker’s Conference and COSAC, and informal networks of the Brussels national parliamentary representatives.

Maurer and Wolfgang Wessels (eds), *National Parliaments on their Ways to Europe Losers or Latecomers?* (Nomos 2001) at 63-64.

²²⁴ Yet, the acronym of COSAC is not used.

²²⁵ Ben Crum and John Erik Fossum, ‘Introduction’ in Ben Crum and John Erik Fossum (eds), *Practices of interparliamentary coordination in international politics* (ECPR 2013) at 5-9.

²²⁶ Ben Crum and John Erik Fossum, ‘Conclusion’ in Ben Crum and John Erik Fossum (eds), *Practices of interparliamentary coordination in international politics* (ECPR 2013) at 252.

²²⁷ Aron Buzogány, ‘Learning from the best? Interparliamentary networks and the parliamentary scrutiny of EU decision-making’ in Ben Crum and John Erik Fossum (eds), *Practices of interparliamentary coordination in international politics* (ECPR 2013).

5.1 The Conference of Speakers of EU Parliaments

The oldest type of cooperation is the Conference of Speakers of European Union Parliaments, which can be dated as far as 1963.²²⁸ The aim of the Conference is ‘safeguarding and promoting the role of parliaments and carrying out common work in support of the interparliamentary activities.’²²⁹ It meets annually and involves the Speakers of parliaments of EU Member States and the EP’s President. In 2008, the conference approved guidelines on inter-parliamentary cooperation which provide for the following aims: the promotion of the exchange of information and best practices between national parliaments and the EP; the safeguarding of the effective exercise of the subsidiarity and proportionality control; and the advancement of the cooperation with parliaments outside of the EU.²³⁰ It decided to establish the CFSP/CSDP (2012) and ‘Article 13 TSCG’ (2013) conferences.²³¹ Besides the aims defined in Protocol No. 1, the EU Speakers’ conference promotes research activities with regard to tools of inter-parliamentary cooperation, such as the Interparliamentary EU information exchange, IPEX, which is an information platform and includes a database, accessible on the IPEX website (www.ipex.eu).

5.1.1 Interparliamentary Conference for the Common Foreign and Security Policy (CFSP) and the Common Security and Defence Policy (CSDP)

This conference was established by a decision of EU Speakers’ Conference in April 2012 in Warsaw ‘in the context of interparliamentary cooperation, as per Protocol (1) on the Role of National Parliaments in the EU.’²³² The aim of this conference is to exchange information and best practices between national parliaments and the EP in the area of CFSP and CSDP (Article 1) and adopt by consensus non-binding conclusions on these aspects (Article 7). Each parliament sends six representatives (seats to be divided in case of bicameral parliaments), whereas the EP can delegate 16 MEPs (Article 2). In addition, the EU candidate Member States and the Member States of NATO can send four representatives each. The

²²⁸ See The History of the EU Speakers Conference available at : <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do>.

²²⁹ Art 2 of the Stockholm Guidelines for the Conference of Speakers of the EU, available at: <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do>.

²³⁰ The Lisbon Guidelines for interparliamentary cooperation in the European Union, point I objectives, available at: <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do>.

²³¹ ‘Article 13’ conference is discussed in Section 6 of this Chapter.

²³² Rules of Procedure of the Inter-Parliamentary Conference for the Common Foreign and Security Policy and the Common Security and Defence Policy, available at: <http://www.europarl.europa.eu/webnp/webdav/site/myjahiasite/shared/Meetings/IPC%20CFSP%20CSDP/FINAL%20-%20RULES%20OF%20PROCEDURE%20-%20EN.pdf>.

Conference should also invite the EU High Representative for Foreign Affairs and Security Policy to its meetings, which take place twice a year within the parliamentary dimension of the Presidency of the Council (Article 3). So far, the topics discussed concerned the ‘Arab Spring’,²³³ conflicts in Africa, especially in the Horn of Africa,²³⁴ the EU’s energy policy and conflict in Syria,²³⁵ as well as in the Ukraine.²³⁶ Because of the constraints that national parliaments face in controlling of the CFSP and CSDP, inter-parliamentary cooperation offers, even for the parliaments perceived as strong scrutinisers, ‘the only viable way’ to organize the scrutiny in this field.²³⁷

5.1.2 IPEX

IPEX was created on the basis of recommendations and agreements concluded by the Conference of Speakers of EU Parliaments in Rome (2000)²³⁸ and the Hague (2004).²³⁹ The IPEX website was launched in 2006, and subsequently amended in 2011.²⁴⁰ The added value was the distribution of legislative acts from the Commission to the IPEX database,²⁴¹ which, until the Lisbon Treaty were formally available to national parliaments only via their governments, and allowing for exchange information about inter-parliamentary meetings and related news.

IPEX allows for the exchange of information between the national parliaments and the European Parliament concerning different issues related to the EU, especially giving an overview of the reasoned opinions issued by national parliaments and other aspects of the subsidiarity review procedure. IPEX hosts all the conferences of national parliaments: the

²³³ See Conclusions of the Cyprus Conference in 2012 available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5420d8f4801424cfed945492c>

²³⁴ See Conclusions of the Irish Conference in 2013 available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5420d8f48014247d6b6bb424f>.

²³⁵ See Conclusions of the Lithuanian Conference in 2013 available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5420d8f480142511f23ac4e55>

²³⁶ See Conclusions of the Greek Conference in 2014 available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5429d1eda0142d7aba23941d9>.

²³⁷ Ariella Huff, ‘Problems and Patterns in Parliamentary Scrutiny of the CFSP and CSDP’ OPAL Online Paper Series <http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108> at 19.

²³⁸ See the Presidency Conclusions available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5319ee5f60131ae42612204a0>.

²³⁹ See the Presidency Conclusions and Guidelines available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5319ee5f60131ae26c80b043c>.

²⁴⁰ Viera Knutelská, ‘Cooperation among national parliaments: an effective contribution to EU legitimation?’ in Ben Crum and John Erik Fossum (eds), *Practices of interparliamentary coordination in international politics* (ECPR 2013) at 41.

²⁴¹ The Commission obliged itself to ‘transmit directly all new proposals and consultation papers’ at the launch of the ‘Barroso initiative’ in 2006. See COM(2006) 211, p. 9.

Conference of Speakers of EU Parliaments, the CFSP/CSDP Conference and the ‘Article 13’ conference.

IPEX has a Board, which consists of the members representing national parliaments that have recently hosted, host or will host as next the Conference of Speakers of EU Parliaments. Other representatives of parliaments that intend to contribute to the conference and the representatives of the EP are also included on the Board. Each national chamber may nominate up to two national IPEX correspondents, who fulfil such tasks as arranging the information concerning their parliaments on the website, keeping the materials on the scrutiny procedures up to date, and translating the key issues to English or French.

Whereas some parliaments see IPEX as ‘an excellent source of information about others’ opinions,’ the functioning of IPEX is problematic.²⁴² The House of Lords has highlighted problems with translations of the documents uploaded by national parliaments, and advised that the IPEX Board could introduce some technological solution, for example ‘automated translations.’²⁴³ Some delay between the proceedings in national parliaments and the information on the website is visible.²⁴⁴

Improving IPEX could be achieved via the timely electronic publication of reasoned opinions, including English translations, and introducing certain ‘warnings’ (e.g. e-mail) in cases where a significant number of opinions have been issued. Some parliaments already provide ‘courtesy translations’ of their reasoned opinions.²⁴⁵ The conclusions of the EU Speakers’ Conference have pointed out that the IPEX guidelines will be amended in order to meet the needs of national parliaments.²⁴⁶

²⁴² Mr Edmund Wittbrodt, Chairman of the European Affairs Committee, Senat, Poland—Written evidence, at 313, available at <http://www.parliament.uk/documents/lords-committees/eu-select/Role%20of%20national%20parliaments/national-parliaments-evidence.pdf>.

²⁴³ House of Lords, European Union Committee, 9th Report of Session 2013-14, *The Role of National Parliaments in the European Union*, point 141. On this issue see also I. Cooper’s evidence attached to the House of Lords report, p. 58.

²⁴⁴ Knutelská at 42.

²⁴⁵ *Ibid* at 43.

²⁴⁶ See Conclusions on IPEX of the meeting of Secretaries General, 26-27 January 2014, available at <http://www.ipe.eu/IPEXL-WEB/euspeakers/getspeakers.do>.

5.2 COSAC

The Conference of Parliamentary Committees for Union Affairs (COSAC) was established in 1989 on the initiative of the president of the French Assemblée Nationale.²⁴⁷ The idea was to provide a palliative to the perceived disconnection of national parliaments from EU affairs after the introduction of direct elections to the EP in 1979.²⁴⁸ As mentioned above, COSAC was first acknowledged in the Treaties via the Amsterdam Protocol. Currently, the task of COSAC, enshrined in Protocol No. 1, is to ‘promote the exchange of information and best practice between national Parliaments and European Parliament.’ COSAC meets twice a year, during each Council Presidency.²⁴⁹ Each parliament can decide on its delegation, which may include up to six members, both from national parliaments and the EP.²⁵⁰ As stated in the Lisbon Treaty, and repeated by the Rules of Procedure, COSAC contributions are not binding for national parliaments.²⁵¹ They should be adopted by consensus and if this is not possible, by 3/4 qualified majority, where each delegation has two votes.²⁵² COSAC can also adopt conclusions.²⁵³

From the EWS perspective, COSAC played an important role as an institution coordinating the first subsidiarity tests, prior to the entry into force of the Lisbon Treaty.²⁵⁴ This gave national parliaments the possibility to exchange information and cooperate on actual Commission proposals. The first of these tests took place in 2005.²⁵⁵ Moreover, since 2004, the COSAC Secretariat produces bi-annual reports on ‘Developments in European Union. Procedures and Practices Relevant to Parliamentary Scrutiny.’²⁵⁶ Both the tests and reports play an important role from the perspective of the EWS. The tests allowed for an assessment of the EWS before the entry into force of the Lisbon Treaty.²⁵⁷ They are in fact positively

²⁴⁷ Preamble to Rules of Procedure of the Conference of Parliamentary Committees for Union Affairs of Parliaments of the European Union, OJ 2011 229/1, 4.8.2011.

²⁴⁸ History of Cosac at <http://www.cosac.eu/documents/>

²⁴⁹ COSAC Rules of Procedure, Section 2.1.

²⁵⁰ COSAC Rules of Procedure, Section 3.1.

²⁵¹ COSAC Rules of Procedure, Section 1.3.

²⁵² COSAC Rules of Procedure, Section 7.5.

²⁵³ COSAC Rules of Procedure, Section 10.

²⁵⁴ For an overview of these tests, see Davor Jančić, ‘Representative democracy across levels? National Parliaments and EU Constitutionalism’ (2012) 8 Croatian Yearbook of European Law and Policy 227, 246 and Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 76-91 who based his findings on these tests.

²⁵⁵ See history of COSAC, p. 24, available at <http://www.cosac.eu/documents/>.

²⁵⁶ Available at: <http://www.cosac.eu/documents/bi-annual-reports-of-cosac/>

²⁵⁷ See the assessment of these tests in Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 91-101 and Cygan, ‘Regional governance, subsidiarity and accountability within the EU’s multi-level polity’, 175

assessed by national parliaments as a ‘useful tool in exchanging best practices amongst Parliaments/Chambers.’²⁵⁸ The reports also dealt with and gave an overview of the adjustments introduced by Member States in this regard and the first evaluations of the functioning of the subsidiarity mechanism.²⁵⁹

The future role of COSAC is currently under discussion.²⁶⁰ It is argued that ‘interparliamentary communication and co-ordination through COSAC at the centre will only be for the benefit of improving subsidiarity monitoring.’²⁶¹ COSAC, in comparison to other bodies of interparliamentary cooperation, is perceived as producing ‘knowledge’ in its reports and conclusions.²⁶² Because the aim of COSAC is also to exchange best practices, it seems that COSAC is a useful tool in this respect. To this end, the speakers of the workshop on the role of COSAC furnished some examples.²⁶³ First, the Dutch parliament used one of the COSAC reports on the information supply to the national parliaments (2009), which showed that some parliaments have better access to the database of the Council. This argument was used successfully in the negotiations with the government. Second, the Cypriot parliament used the 11th bi-annual COSAC report on the permanent representatives in the Brussels parliament to justify establishing its permanent representative.

Some ideas on improving COSAC were also discussed. It was argued, for example, that allowing COSAC to conduct a small number of examinations of Commission proposals every six months when the presidency meeting takes place could be beneficial, and should not be considered as a risk for the European legislative process. One of the reforms of COSAC could be include a more targeted focus in its agenda, as well as a possibility for each of the parliaments to signal its own priorities before the COSAC meeting. In addition, it was posited that the topics of the questionnaire should be reflected on the COSAC’s agenda.

²⁵⁸ See COSAC 21st Bi-annual Report on EU Practices and Procedures (June 2014) at 11.

²⁵⁹ See COSAC, 13th Bi-annual Report on EU Practices and Procedures (May 2010); 18th Bi-annual Report on EU Practices and Procedures (September 2012); 19th Bi-annual Report on EU Practices and Procedures (May 2013) and 20th Bi-annual Report on EU Practices and Procedures (October 2013).

²⁶⁰ See especially COSAC 21st Bi-annual report. See also the points regarding COSAC in the EP Constitutional Affairs Committee discussion of on the EP report on the relations between European Parliament and national parliaments (A7-0255/2014) on 17.03.2014.

²⁶¹ Cygan, ‘Regional governance, subsidiarity and accountability within the EU’s multi-level polity’, 174.

²⁶² Opinion expressed at the workshop on the occasion of the COSAC Chairpersons meeting at the Italian Senate on ‘The role of COSAC in the Europeanisation of national parliaments and in the evolution of inter-parliamentary cooperation,’ at LUISS Guido Carli, 18.07.2014.

²⁶³ Workshop on the occasion of the COSAC Chairpersons meeting at the Italian Senate on ‘The role of COSAC in the Europeanisation of national parliaments and in the evolution of inter-parliamentary cooperation,’ at LUISS Guido Carli, 18.07.2014. Speakers included: D.A.Capuano (Italian Senate), B. Dias Pinheiro (Portuguese Parliament), A. Esposito (Italian Chamber of Deputies), C. Fryda (Permanent Member of the COSAC Secretariat), F. Gomez Martos (EP) and M. Van Keulen (Dutch House of Representatives).

5.3 National Parliaments' Representatives in Brussels

National parliaments have established their permanent representatives in Brussels to represent them at EU level. They are often described as 'key players' for the inter-parliamentary coordination and exchange with EU institutions.²⁶⁴

National Parliamentary Representatives were already present in Brussels before the entry into force of the Lisbon Treaty. In 1991, the Danish Folketing was the first parliament to establish its representative in Brussels.²⁶⁵ Currently all national parliaments, except for the Slovak and Bulgarian assemblies, send representatives. National parliaments with two chambers usually send one (for example Poland or the UK) or two representatives (Italian Camera dei Deputati) per chamber, similar to unicameral parliaments, which delegate either one (for example Slovenia, Austria) or two representatives (Greece).²⁶⁶ The titles of the national representatives vary: most of them are 'the (Permanent) Representatives/Officers to the European Union,' whereas others are styled as '(Permanent) Representatives to the European Parliament' or 'to the EU institutions.'²⁶⁷

Whereas it can be said that NPRs 'mostly facilitate informal, day-to-day cooperation,'²⁶⁸ Högenauer and Neuhold distinguish between the following functions of the NPRs.²⁶⁹ First, their role is to provide a link between the EU and national level and thus inform national members of the parliament on EU issues. The national representatives may report on EU developments and political issues on a regular weekly basis or *ad hoc* on urgent matters or such matters that are interesting only for a limited number of MPs.²⁷⁰ Second, as indicated by Högenauer and Neuhold, national representatives play a representational function, by building relationships between members of parliaments and EU institutions. These may for example include organizing visits of national MPs to the EP, liaising with the national MEPs or participating in inter-parliamentary conferences.²⁷¹ Third, national representatives create links between national parliaments by updating each other on the national positions. This last function of the national representatives played a role in the triggering of the first 'yellow

²⁶⁴ Anna-Lena Högenauer and Christine Neuhold, 'National Parliaments after Lisbon: Administrations on the Rise' OPAL Online Paper Series <http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108> at 15.

²⁶⁵ COSAC 11 th Bi-annual report at 23.

²⁶⁶ See <http://www.europarl.europa.eu/webnp/cms/pid/18/cache/offonce>.

²⁶⁷ COSAC 11th Bi-annual report at 25.

²⁶⁸ Knutelská at 38.

²⁶⁹ Högenauer and Neuhold at 26-27.

²⁷⁰ COSAC 11th Bi-annual Report at 28.

²⁷¹ Ibid at 26-27.

card,’ as they kept national parliaments constantly updated about the state of play.²⁷² The NPRs meet during the so-called ‘Monday morning meetings’, which were established in practice and are not formally regulated. Attendance is not obligatory, unless requested by their Member States. In addition, invited representatives of the EP, Commission or Council, who usually leave the meeting after the issue at stake is discussed, can attend the meetings.

5.4 Best practices of inter-parliamentary cooperation in the EWS

The COSAC reports, which are based on questionnaires completed by national parliaments, highlight the best practices in inter-parliamentary cooperation, which is helpful from the EWS perspective. Looking at inter-parliamentary cooperation from the perspective of reaching ‘yellow’ and ‘orange card’ thresholds, the most used tool is a simple email exchange between parliaments, with an early notice of adopted reasoned opinions, followed by the use of the IPEX platform and the receiving and forwarding of information to national parliamentary representatives in Brussels.²⁷³ In these cases, usually around half of the chambers responding to COSAC’s questionnaire replied that the information was helpful in drafting their own reasoned opinions. Other mechanisms of inter-parliamentary cooperation included passing or receiving information from the governmental representative, letters from chairmen of committees or their members in other parliaments, discussions on the margin of COSAC meetings, at EP inter-parliamentary meetings or within the debates between parliamentary committees.²⁷⁴

Specifically with regard to the first ‘yellow card’ reached by national parliaments, the COSAC report clearly indicates a ‘complex and intensive’ exchange preceding the deadline for issuing reasoned opinions.²⁷⁵ Out of 37 responding parliamentary chambers, 28 admitted to exchanging information with the national parliamentary representatives in Brussels, and 25 chambers used the IPEX database to exchange information on the status of the Commission proposal with their counterparts EU-wide, whereas 22 exchanged information with their respective national governments.²⁷⁶ Other sources of information included, *inter alia*,

²⁷² Ian Cooper, *A Yellow Card for the Striker: How National Parliaments Defeated EU Strikes Regulation* (2013), 20.

²⁷³ COSAC 19th Bi-annual report at 28-29.

²⁷⁴ *Ibid* at 29.

²⁷⁵ *Ibid* at 31.

²⁷⁶ The bicameral parliaments of Austria, Ireland and Spain submitted one set of replies for both chambers, hence the total number of respondents per question was 38, yet 37 responses to the COSAC questionnaire were submitted. See COSAC 19th Bi-annual report, at IV. For comparison see also COSAC 17th Bi-annual Report on

exchanges between administrative bodies; exchanges with the national government; and further exchanges through the COSAC meeting or between parliamentary committees.

The COSAC report also points out that 60% of responding parliaments would like to improve the subsidiarity principle checks in the framework of COSAC by pre-selecting specific proposals from the Commission Work Programme to be discussed in COSAC meetings; 63% would like to discuss in COSAC meetings the proposals that triggered a ‘yellow card’; and 90% would like to discuss the Commission’s replies to a ‘yellow card’.²⁷⁷ Some parliaments, however, expressly rejected the coordination of subsidiarity checks by COSAC as ‘in contradiction to the conferral of relevant responsibilities to individual parliaments, which are exercised in accordance with Parliaments’ own procedures and powers.’²⁷⁸

The success of inter-parliamentary cooperation is rather negatively assessed by the EP, which claims that ‘despite efforts (...) national parliaments have not yet managed to establish effective forms of cooperation on Protocol No. 2 among themselves.’²⁷⁹ When it comes to the specific influence of inter-parliamentary cooperation on the awareness of MEPs of the national parliaments’ reasoned opinions or contributions, this is not easy to measure. Beyond the conferences, the Joint Parliamentary Meetings, which aim at ‘improving parliamentary awareness of the need for oversight and control over decisions taken at EU level’ and the Joint Committee Meetings in which corresponding committees discuss matters of shared concern, bring together MPs and MEPs.²⁸⁰ Some national parliaments see it as a possibility to debate potential subsidiarity concerns with regard to new proposals with other parliamentarians.²⁸¹ The House of Lords, in its recent report, has also recommended that national parliaments’ committees contact relevant EP rapporteurs and shadow rapporteurs with regard to legislative acts which are of interest to them.²⁸²

6 The role of national parliaments in the Eurozone crisis

EU Practices and Procedures (April 2012) at 12, which also indicates NPRs as the most used source of information on other parliaments.

²⁷⁷ COSAC 21st Bi-annual report at 18.

²⁷⁸ Ibid at 21.

²⁷⁹ European Parliament, Report on ‘Interparliamentary relations between the European Parliament and national Parliaments under the Treaty of Lisbon 2009-2014’, Annual Report 2013/2014 at 18, available at: <http://www.europarl.europa.eu/webnp/cms/pid/1829>.

²⁸⁰ More on these meetings see: <http://www.europarl.europa.eu/webnp/cms/pid/10>.

²⁸¹ COSAC 21st Bi-annual report at 24.

²⁸² House of Lords, European Union Committee, 9th Report of Session 2013-14, point 109.

The last section of this chapter deals with the new challenges for national parliaments posted by the Eurozone crisis from two points of view: the approval of the new legal measures and the functions that the new legal measures grant to national parliaments. In addition, this section shows that, due to the impact of the new, mostly intergovernmental, measures on the competences of national parliaments, safeguarding their role can be accomplished at the national level, as in Germany.

Responses to the Euro crisis had mostly an intergovernmental character, which in turn had important consequences for national parliaments.²⁸³ Legal acts adopted in this regard only partially took the form of EU legislative proposals suitable for review through the EWS. These included in particular the so-called Six Pack and Two Pack. Although appropriate for the subsidiarity review, these measures did not gain many opinions from national parliaments. Indeed, only one of the Two-Pack regulations, on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area²⁸⁴ received a reasoned opinion from the Swedish parliament and the French Senate. The French parliament highlighted that the proposal is not explicitly motivated with regard to its compliance with the subsidiarity principle.²⁸⁵ The subsidiarity principle was also violated, as the composition and functioning of the ‘independent bodies’ dealing with fiscal rules at the national level should leave a large margin of appreciation to the Member States. The parliament also highlighted that granting the principle of structural balance a fully binding force in the national budgetary process would demand a constitutional amendment. The Swedish parliament, in its reasoned opinion, argued that the proposal ‘does not contain sufficient guarantees to safeguard national competence as regards fiscal policy.’²⁸⁶ The other Two-Pack Regulation and the Six-Pack proposals received a limited number of opinions within the political dialogue.²⁸⁷

²⁸³ Arthur Benz, ‘An asymmetric two-level game: parliaments in the Euro crisis’ in Ben Crum and John Erik Fossum (eds), *Practices of interparliamentary coordination in international politics* (ECPR 2013) at 134. Similarly, others indicate that ‘National parliaments therefore *do* have tools at their disposal to control the executive in financial affairs although they do still not fully resort to them in the practical political process.’ It is hence proposed that parliaments coordinate matters with other parliaments as well as within the parliament. Cf. Oliver Höing and Christine Neuhold, ‘National parliaments in the financial crisis’ Between opportunity structures and action-constraints’, OGfE Policy Brief 5.

²⁸⁴ COM(2011) 821.

²⁸⁵ French Senate, Reasoned opinion of 24.01.2012 on COM(2011) 821.

²⁸⁶ Swedish Riksdag, Reasoned opinion of 25.01.2012 on COM(2011) 821.

²⁸⁷ Belgian Chamber of representatives, opinion of 14.02.2012 on COM(2011) 819; Portuguese Portuguese parliament opinion of 11.01.2012 on COM(2011) 819, 821; Italian Senato, opinion of 26.09.2012 on COM(2011) 819, 821; Romanian Chamber of Deputies, opinion of 10.10.2012 on COM(2011) 819, 821. The

However, beyond the EWS, national parliaments participated in the approval of the Article 136 amendment, the ESM Treaty and the TSCG at the national level.²⁸⁸ In this respect, some parliaments lodged cases at their respective constitutional courts, checking the validity of the treaties in question, as was the case for example in Poland and in Germany.

Out of these measures, the Two-Pack, the TSCG and the ESM involve some functions for national parliaments.²⁸⁹ The Two-Pack regulation on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area,²⁹⁰ highlights that the ‘reinforced coordination and surveillance should be accompanied by commensurate involvement of the European Parliament and of national parliaments as appropriate.’²⁹¹ However, this involvement is limited to a possibility for national parliaments to request that the Commission present its opinion on the draft budgetary plan to the parliament in question.²⁹² The Commission’s opinion shall be made public and shall be presented to the Eurogroup. Thereafter, at the behest of the parliament of the Member State concerned or of the European Parliament, the Commission presents its opinion to the parliament making the request. According to the other Two-Pack regulation²⁹³ national parliaments may invite the representatives of the Commission to participate in an ‘exchange of views,’ in cases where a recommendation to adopt precautionary corrective measures or to prepare a draft macroeconomic adjustment programme has been issued by the Commission with regard to a Member State subject to

opinions sent on the Six-Pack concerned usually the whole package of acts. Cf. Report from the House of Lords, *The future of Economic Governance in the EU*, 12th Report of Session 2010-11; Italian Chamber of Deputies, opinion of 10.12.2010 and the Italian Senato, 16.12.2010; Czech Senate, opinion of 26.01.2011; Bulgarian parliament, opinion of 30.03.2011; Luxembourg parliament, opinion of 30.11.2010; Portuguese parliament, opinion of 10.12.2010 on COM(2010) 522, 524, 525, 526.

²⁸⁸ See further <http://eurocrisislaw.eu.eu>.

²⁸⁹ On the competences of national parliaments under the ESM Treaty and TSCG see also Jančić, ‘Representative democracy across levels? National Parliaments and EU Constitutionalism’, 234. Moreover, within the Six Pack only the regulation Council Regulation (EU) No 1177/2011 of 8 November 2011 amending Regulation (EC) No 1467/97 on speeding up and clarifying the implementation of the excessive deficit procedure OJ L 306, 23/11/2011, p. 33–40 indicated that ‘the strengthening of economic governance should include a closer and more timely involvement of the European Parliament and the national parliaments.’

²⁹⁰ Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area OJ L 140, 27/05/2013, p. 11–23.

²⁹¹ Recital 6 Regulation EU No 473/2013. On the Two Pack and role of national parliaments see also European Commission, *The Two-Pack on economic governance: Establishing an EU framework for dealing with threats to financial stability in euro area member states* (2013) at 17.

²⁹² Art 7(3) EU Regulation No 473/2013.

²⁹³ Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability OJ L 140, 27/05/2013, p.1–10.

enhanced surveillance, after conducting a regular review mission in that country.²⁹⁴ This possibility is also available to national parliaments when the recommendation has been made public.²⁹⁵ In addition, national parliaments may invite representatives of the Commission for an ‘exchange of views’ on the progress made in the implementation of its macroeconomic adjustment programme in the Member State concerned.²⁹⁶ In the same vein, the ESM Treaty provides only a very limited role for national parliaments: the Board of Governors should allow access for national parliaments to an annual report prepared by the Board of Auditors.²⁹⁷ All the competences assigned to national parliaments thus possess an ex-post character; they are also ‘soft’ in nature as they are limited to exchanges of views without the possibility of a real impact on the act in question. It remains to be researched how these mechanisms function in practice and if they will play any role.

The TSCG seems to be of greater importance for national parliaments. The TSCG refers to national parliaments in two aspects. First, the automatic correction mechanism to be triggered in cases of observed deviations from the MTO, which should be implemented at national level by the Member States ‘shall fully respect the prerogatives of national parliaments.’²⁹⁸ Second, Article 13 TSCG provides national parliaments with a forum to discuss budgetary policies. Article 13 TSCG, relying on the inter-parliamentary cooperation enshrined in Protocol No. 1 established that the EP and national parliaments of the contracting parties to the TSCG will launch a conference of the relevant committees to discuss budgetary policies and other issues covered by the TSCG.²⁹⁹

The Conference of Speakers of the European Union Parliaments held in Nicosia in April 2013 took the decision to establish the new conference, which was first held in October of the same year in Vilnius.³⁰⁰ The Draft Rules of Procedure tabled in Vilnius in October 2013 foresee that the conference replaces the meetings of the chairpersons of relevant committees (economic affairs committees) organised within the Council Presidency, as well as the European Parliamentary Week of the European Semester organized by the EP in the first

²⁹⁴ Art 3(7) EU Regulation No 472/2013.

²⁹⁵ Art 3(8) EU Regulation No 472/2013.

²⁹⁶ Art 7(11) EU Regulation No 472/2013.

²⁹⁷ Art 30(5) ESM Treaty.

²⁹⁸ Art 3(2) TSCG.

²⁹⁹ On the background of Art 13 TSCG see Valentin Kreiling, ‘The New Inter-Parliamentary Conference for Economic and Financial Governance’ Notre Dame Policy Paper <<http://www.eng.notre-europe.eu/011-16883-Inter-Parliamentary-Conference-for-ECOFIN-Governance.html>> at 8-10.

³⁰⁰ See ‘IC Article 12 Speaker’s invitation’ available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5420d8f480142511007da4e18>.

semester of each year (Section 1.2.).³⁰¹ The conference is composed of delegations from relevant committees of EU national parliaments and of the EP, the number of which is to be determined by each parliament (Section 4.1.). The issues to be discussed by the conference concern matters relating to EU economic and financial governance, particularly to matters covered by the TSCG (Section 5.2). The conclusions should be adopted by consensus, and where this is not possible, by qualified majority of $\frac{3}{4}$ votes cast (Section 3.7). These Rules of Procedure are still under discussion, as the disputed elements include issues such as the voting mechanisms³⁰² or the number of MPs in delegations.³⁰³

Crum has expressed the idea that the conference should be ‘more than a mere platform for the exchange of opinions’; it should allow for the review of the conditions that are attached to financial aid: parliaments could reflect on their ‘reconcilability with the right to democratic self government of the state involved.’³⁰⁴ This function seemed for Crum to be a ‘fitting extension of the role of subsidiarity guardians that the Treaty of Lisbon has already bestowed upon the national parliaments.’³⁰⁵ However, the lack of a decision on the structure of the conference, as well as the absence of decision-making powers for the conference, provide a rather pessimistic impression of its future. Providing a forum for debate with non-binding conclusions presents a ‘serious threat’ to the work of the conference.³⁰⁶

What appears to be a clear consequence of the Eurozone crisis for national parliaments is that, with regard to budgetary competence some parliaments are ‘mere bystanders’, while others can ‘actively influence executive policy-making.’³⁰⁷ The German Bundestag belongs

³⁰¹ See Draft Rules of Procedure proposed by the Lithuanian presidency (2013) and amended by the Hellenic presidency (2014) available at: <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5428b1a43014298b2999d0f06>.

³⁰² See UK proposals to the Draft Rules of procedure, supported also by the Greek presidency, proposing that the conclusions can be adopted only by consensus and the disagreement with the UK and Hellenic changes by the French Assemble Nationale and Senat (urging to keep the $\frac{3}{4}$ majority possibility if the consensus is not reached) available at <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5420d8f480142511007da4e18>.

³⁰³ See reply from the German Bundesrat and the Irish parliament to Art 13 RoP-debate, criticising the proposals put forward by the presiding Hellenic Parliament limiting the number of MPs to 4 or 6 and a possibility to limit this number by the hosting presidency available at: <http://www.ipex.eu/IPEXL-WEB/euspeakers/getspeakers.do?id=082dbcc5420d8f480142511007da4e18>.

³⁰⁴ Ben Crum, ‘Saving the Euro at the Cost of Democracy?’ (2013) 51 *Journal of Common Market Studies* 614, 627.

³⁰⁵ *Ibid* at 627.

³⁰⁶ Kreilinger at 18.

³⁰⁷ Oliver Höing, ‘Differentiation of Parliamentary Powers. The German Constitutional Court and the German Bundestag within the Financial Crisis’ in M. Cartabia, N. Lupo and A. Simoncini (eds), *Democracy and subsidiarity in the EU* (Il Mulino 2013), at 281. Höing shows also a comparison of national parliaments powers with regard to decisions on aid packages and tranches within the EFSF.

to the latter types of parliaments. This is due to the ‘external’ protection of the German Bundestag by the Federal Constitutional Court.³⁰⁸ Indeed, the position of the Bundestag has been strengthened with regard to three aspects of its competence: the approval of financial aid,³⁰⁹ the participation of the MPs in decisions concerning budgetary responsibility³¹⁰ and the stretching of information rights of the Bundestag on intergovernmental measures.³¹¹ It is also expected that the Court will protect the Bundestag’s budgetary sovereignty again in the OMT case, with the first preliminary question pending before the ECJ.³¹²

Yet, according to Franz Mayer, the jurisprudence of the German Constitutional Court on the strengthening of the control rights of the Bundestag as a mean of safeguarding the democracy principle highlights three major problems.³¹³ First, the Court disregards the role of the EP as a provider of democracy at the EU level.³¹⁴ Second, according to Mayer, the Court’s ‘patronizing’ perception of what the Bundestag’s role in EU matters should be is overly

³⁰⁸ Cristina Fasone, ‘National Parliaments in the Eurozone Crisis. Challenges and Transformations’ (IX World Congress of Constitutional Law) at 7. See also an overview of the German decisions there.

³⁰⁹ BVerfG, 2BvR 987/10, 2 BvR 1485/10, 2 BvR 1099/10, judgment of 7 september 2011. The Court ruled that federal government is obliged to always obtain prior approval of the Bundestag’s Budget Committee before a guarantee will be granted according to the Euro Stabilisation Mechanism Act (Euro Stabilisierungsmechanismus-Gesetz). See on this decision Christian Calliess, ‘The Future of the Eurozone and the Role of the German Federal Constitutional Court’ (2012) 31 Yearbook of European Law 402, 407.

³¹⁰ BVerfG, 2BvE 8/11, judgment of 28 February 2012, para 124-125. The Court invalidated national law that allowed in cases of particular urgency and confidentiality the consent of the Bundestag to the decisions of the German representative to the EFSF to be taken by a decision of committee consisting of a several members of the budget committee chosen by the German Bundestag (Sondergremium). In the view of the Court, ‘the German Bundestag exercises its function as a body of representation in its entirety and through the participation of all of its members, not through individual members, a group of members of the parliamentary majority.’ To this end, first, the principle of the mirror image (*Spiegelbildlichkeit* - the sub-units of the German *Bundestag* must constitute a microcosm of the plenary session) must be respected. See also BVerfG, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2BvE 6/12, judgment of 18 March 2014 (compatibility with the constitution of a number of legal acts including the approval of the Article 136 TFEU amendment, the ESM Treaty and the TSCG).

³¹¹ BVerfG, judgment of 19 June 2012, 2 BvE 4/11, Leitsatz 2-4. The decision concerned the ESM and the agreement on the Euro Plus Pact. The Federal Constitutional Court stated that the Bundestag has to be comprehensively informed ‘at the earliest possible time’ so that it can exercise its participation rights.’ The only limit to the information rights is the principle of separation of powers: ‘as long as the opinion-forming by the federal government did not come to an end, parliament has no right to be informed’. See also BVerfG, 2 BvR 1390/12, 2 BvR 1421/12, 2 BvR 1438/12, 2 BvR 1439/12, 2 BvR 1440/12, 2BvE 6/12, judgment of 12 September 2012 (temporary injunction with regard to the ESM Treaty)

³¹² BVerfG, 2 BvR 2728/13, order of 14 January 2014. The Court is expected to ensure that the ECB cannot purchase the government bonds as long as the parliament does not approve the OMT programme burdening the federal budget. Cf. Dietrich Murswiek, ‘ECB, ECJ, Democracy, and the Federal Constitutional Court: Notes on the Federal Constitutional Court’s Referral Order from 14 January 2014’ (2014) 15 German Law Journal 147, 163 & 165.

³¹³ See Franz C Mayer, ‘Rebels without a Cause: A Critical Analysis of the German Constitutional Court’s OMT Reference’ (2014) 15 German Law Journal 111, 139-141.

³¹⁴ Yet, it has to be observed that the EP plays a rather limited role in the EU economic governance, even though strengthened in comparison to its role before the crisis. See C. Cristina Fasone, ‘European Economic Governance and Parliamentary Representation. What Place for the European Parliament?’ (2014) 20 European Law Journal 164.

idealistic and comes from an institution that itself is not directly elected or democratically accountable.³¹⁵ Third, in some cases, executive power is better at safeguarding that urgent decisions are promptly taken, or, as in the case of the ECB – its independence excludes parliamentary oversight. Other critical points, in addition to those of Mayer, highlight that through the protection of the Bundestag’s budgetary rights, the Court also pursues a vision of how these rights should be exercised – maintaining a restrictive budgetary policy and austerity, although no direct indications are given.³¹⁶ In addition, the Court’s ‘one-sided’ decisions ignore the impact of its decisions on parliaments in the Member States receiving the financial assistance.³¹⁷

Whereas some scholars do not connect the loss of powers of national parliaments with the Eurozone crisis,³¹⁸ national parliaments themselves express their concern that there is too little emphasis on their role, in proposals such as ‘Genuine Economic and Monetary Union.’³¹⁹ However, as it is also pointed out, some improvements, the roots of which could be traced to the German jurisprudence are visible in the right to information enhancement in a number of Member States.³²⁰

Conclusion

The aim of this chapter was to provide the background for the specific aspects of the EWS that will be the subject of the main part of this thesis. Hence, mostly in descriptive terms, it traced both the evolution of the role of national parliaments, as well as of the subsidiarity principle in the EU. National parliaments were steadily awarded more and more powers, and the climax was reached with the introduction of the EWS in the Lisbon Treaty. Specifically, Protocol No. 2 allows national parliaments to pursue a new function, namely controlling EU legislation against possible violations of the subsidiarity principle. The principle itself, introduced by the Treaty of Maastricht, was explicated by the Edinburgh Declaration and the

³¹⁵ Mayer, 140.

³¹⁶ Henning Deters, ‘National Constitutional Jurisprudence in a Post- National Europe: The ESM Ruling of the German Federal Constitutional Court and the Disavowal of Conflict’ (2014) 20 *European Law Journal* 204, 214.

³¹⁷ *Ibid.*

³¹⁸ Benz at 140. Benz indicated that ‘national parliaments in general have not lost out as a result of the crisis. Rather, it is the asymmetry of the parliamentary involvement in the Member States and the degradation of multilateral relations among parliaments that has caused a new democratic deficit.’

³¹⁹ House of Lords, European Union Committee, 9th Report of Session 2013-14, *The Role of National Parliaments in the European Union*, 24 March 2014, at 47.

³²⁰ Fasone, ‘National Parliaments in the Eurozone Crisis. Challenges and Transformations’ at 14.

Amsterdam Protocol. Since the Lisbon Treaty, the subsidiarity principle has been enshrined in Article 5(3) TEU.

This chapter has focused on the design of the EWS, its construction, frames and application. In this respect, the participation of other EU bodies – the EP, the Council and the Committee of the Regions – was also studied. Thereafter, this chapter investigated the other mechanism of political participation for national parliaments: the ‘Barroso initiative.’ Its main features and the differences between this system and the EWS were indicated. Moreover, it was highlighted that this system is much more commonly used than the EWS. In addition, the chapter discussed the available mechanisms of inter-parliamentary cooperation in general, as well as pointing out those that are specifically useful within the EWS: COSAC and its tool IPEX as well as the position of the national parliaments’ representatives in Brussels. Finally, the chapter discussed the challenges posed by the Eurozone crisis on the role of the national parliaments.

The following chapter, taking stock of this background knowledge, will explore the details and nuances of the EWS.

Chapter 2: The Scope of the EWS¹

Introduction

Paul Craig aptly voiced the main concerns which the freshly initiated EWS procedure presented: it was unknown ‘how far the new provisions in the Protocol according greater power to national parliaments [will] affect the incidence and nature of EU legislation.’² In his view, its success depended upon the ‘willingness of national Parliaments to devote the requisite time and energy to the matter.’ Moreover, Craig argued that to focus reasoned opinions on subsidiarity may not constitute an easy exercise for national parliaments. It might be even harder for national parliaments to collect the necessary number of reasoned opinions for the same draft legislative act in order to require the Commission to review the proposal.

Four years after the entry into force of the Lisbon Treaty, we can assess whether the concerns expressed by Craig were confirmed in practice. As was shown in the previous chapter, national parliaments are actively participating in the subsidiarity review, and two ‘yellow cards’ have been triggered thus far. The second aspect mentioned by Craig – the content of the reasoned opinions – is more problematic. This chapter will thus focus on the question ‘*what is the scope of the subsidiarity review?*’ In this respect, the relationship between the Article 5 TEU principles of conferral, subsidiarity and proportionality will be discussed. Next, this chapter will put forward the core textual, structural and functional arguments for a narrowly tailored subsidiarity scrutiny. The following sections look at the tests involved in subsidiarity scrutiny: the national insufficiency test and the EU comparative efficiency test. Within the national insufficiency test, it is also pondered upon how many ‘insufficient’ Member States are needed for the EU proposal to pass the test. In addition, the supplementary tests, such as the cross-border activity and ‘special interest’ tests will be elaborated upon. Finally, this chapter also explores the procedural aspect of the subsidiarity principle connected to the proof supporting the contention that the two subsidiarity tests are fulfilled. The case study of the EPPO proposal aims to examine how the theoretical assumptions about subsidiarity apply in practice. By comparing the EPPO proposal to the earlier ‘yellow card’ concerning the Monti II directive, it is possible to ponder the prospective future of this mechanism.

¹ Parts of this chapter draw upon Federico Fabbrini and Katarzyna Granat, ‘Yellow card, but no foul: The role of the national parliaments under the subsidiarity protocol and the Commission proposal for an EU regulation on the right to strike’ (2013) 50 Common Market Law Review 115.

² Craig, *The Lisbon Treaty: law, politics, and treaty reform* at 49.

1 Scope of the EWS

The essential question of the EWS concerns the *scope* of the review that should be exercised by national parliaments under Protocol No. 2. In other words, what elements should national parliaments assess in their subsidiarity review? Is the EWS only about the strict question as to whether a legislative act should be adopted at the EU or national level? Or rather, should national parliaments also consider the appropriateness of the legal basis of EU draft legislative acts, their proportionality or necessity, and their substance, for example in relation to delegations to adopt delegated and implementing acts or fundamental rights standards? As Gareth Davies hypothesised in 2003, long before the EWS began to function: ‘would national parliaments stick to their narrow brief to make a subsidiarity assessment, or would they ask themselves the simpler and more political question, “do we want this law or not?”’, predicting that ‘subsidiarity may often be no more than a mask.’³ The Commission’s rebuttal of non-subsidiarity arguments may in consequence ‘generate frustration at national level, and turn parliaments into adversarial participants in a system premised on a shared willingness to compromise.’⁴

It can be argued that the distinction between parliaments being able to comment on the content of the proposal and on whether it observes the subsidiarity principle is ‘artificial and limits parliamentary voice.’⁵ As Bast and von Bogdandy argue ‘institutional isolation of subsidiarity outside the political institutions is unconvincing; the questions whether the national level is ‘insufficient’ and whether European level might ‘better’ handle the problem are not meaningfully separable from the political questions arising from the issue. The evaluation of subsidiarity is, to a large degree, a matter of political discretion, for which the political institutions of the EU must be accountable to the EU.’⁶ Hence, in fact, the EWS ‘invites national parliaments to dress up any political concern in the guise of a subsidiarity claim.’⁷

Similarly, Weatherill pondered the question of ‘[h]ow really to decide where subsidiarity – and therefore the reasoned opinion – ends?’ and argued that ‘[p]ractice may escape these

³ Davies at 695-696.

⁴ Ibid at 696-698.

⁵ Damian Chalmers, ‘Democratic Self-Government in Europe: Domestic Solutions to the EU Legitimacy Crisis’ Policy Network Paper <<http://www.policy-network.net/publications/4399/democratic-self-government-in-europe>> .

⁶ Armin von Bogdandy and Jürgen Bast, ‘The Federal Order of Competences’ in Armin von Bogdandy and Jürgen Bast (ed), *Principles of European Constitutional Law* (Hart 2010) at 303.

⁷ Ibid at 304.

formal bounds. But they need not have been drawn so unnecessarily tightly in the first place.’⁸

Different understandings of the subsidiarity principle generally perceived as a concept of ‘high degree of fluidity and vagueness’⁹ have been put forward by parliamentary committees and scholars alike. Parliamentary committees have advanced different answers concerning what a subsidiarity test encompasses, ranging from a strict test of subsidiarity violations to a broader check of Article 5 TEU.¹⁰ The EU legal doctrine dealt especially with the understanding of the relationship with other principles of Article 5 TEU (conferral and proportionality), which has an impact on the issues that should be tested under Protocol No. 2, including a three-tier test of conferral, subsidiarity and proportionality principles underlining the integrity of Article 5 TEU.¹¹ The following section will deal with these issues.

1.1 The relationship between the principles of Article 5 TEU

1.1.1 The principles of conferral and subsidiarity

The relationship *between the principles of conferral and subsidiarity* has been elaborated on by a number of authors. Calliess justifies the inclusion of the conferral principle in the subsidiarity test as ‘pre-question’ demanded by a systematic interpretation of Article 5 TEU; competence and subsidiarity cannot be separated.¹² Drawing boundaries between these two principles is not easy, because subsidiarity ‘as a rule for the exercise of competences [...] is based on an already existing Union competence.’¹³ Hence the conferral principle might be

⁸ Stephen Weatherill, ‘Better competence monitoring’ (2005) 30 European law review 23, 39.

⁹ de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’ at 8.

¹⁰ See e.g. for the German Bundestag 8. Sitzung des Unterausschusses Europarecht, Öffentliches Expertengespräch Prüfung des unionsrechtlichen Subsidiaritätsprinzips im Unterausschuss Europarecht des Rechtsausschusses des Deutschen Bundestages am 16. Juni 2010. Compare here opinions of C. Calliess - favouring of a broad review of Art 5 TEU- and F. Mayer -favouring a narrower review. See also the House of Commons discussion on the principle of subsidiarity, House of Commons European Scrutiny Committee, Subsidiarity, National Parliaments and the Lisbon Treaty, Thirty-third Report of Session 2007-08, published on 21 October 2008, Oral Evidence taken before the European Scrutiny Committee. (See witness evidence by A. Dashwood and S. Hix).

¹¹ See Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 98-100; Christoph Ritzer, Marc Ruttloff and Karin Linhart, ‘How to Sharpen a Dull Sword-The Principle of Subsidiarity and its Control’ (2006) 7 German Law Journal 733, 737.

¹² Calliess, *Subsidiaritäts-und Solidaritätsprinzip in der Europäischen Union* at 64.

¹³ von Bogdandy and Bast at 287.

labelled as the ‘responsibility criterion,’ in other words, a check on the existence of an EU competence to legislate.¹⁴

On the contrary, the ECJ Judge Thomas von Danwitz posits that the Amsterdam Protocol provided for ‘tangible contours’ to the concept of subsidiarity, allowing for its legal application as ‘a benchmark for the exercise of nonexclusive Community competences in specific cases’, in addition to the Lisbon Treaty’s ‘emphasis on the task of separation of competences.’¹⁵ Von Danwitz concludes from this that subsidiarity cannot settle the question of competence, even though that question might be related to the more general idea of subsidiarity.¹⁶ The relationship between the principles of conferral and subsidiarity and the approach of national parliaments taken for their scrutiny is further elaborated upon in Chapter 6.

1.1.2 The relationship between subsidiarity and proportionality

The *relationship between subsidiarity and proportionality* has garnered particular interest in the EU scholarship and requires further elaboration. Two positions are at stake: the first sees no relationship between the two principles, while the second perceives a ‘close relationship’ between them.¹⁷ Accordingly, some scholars see a clear difference between questions of subsidiarity and proportionality.¹⁸ For example, Toth claims that the proportionality principle ‘cannot be a manifestation of subsidiarity since it is applied by the Court across the whole range of the Treaty, while subsidiarity applies only to certain matters.’¹⁹

An opposite view talks about ‘cannibalization’ of subsidiarity by the proportionality principle by tying the ‘who’ and ‘how’ questions together.²⁰ Ziller argues that the subsidiarity principle expressed in Article 5(3) TEU contains elements of the proportionality principle, such as adequacy, necessity and proportionality *stricto sensu*.²¹ Adequacy is expressed by the phrase

¹⁴ Cygan, *Accountability, parliamentarism and transparency in the EU* at 133. Cygan who puts forward a three-step test of the subsidiarity principle gives a broad understanding of subsidiarity: ‘responsibility criterion’, ‘necessity requirement’ and ‘efficiency criterion.’

¹⁵ Thomas von Danwitz, ‘Subsidiaritätskontrolle in der Europäischen Union’ in K. Hansmann K.-P. Dolde, S. Paetow, E. Schmidt-Assmann (ed), *Verfassung-Umwelt-Wirtschaft Festschrift für Dieter Sellner zum 75 Geburtstag* (Beck 2010) at 40.

¹⁶ Ibid at 41.

¹⁷ Blanke at 253.

¹⁸ Edward at 99-100.

¹⁹ Toth, ‘The principle of subsidiarity in the Maastricht Treaty’, 1083. Also Barrett excludes objections to the proportionality (and the substance of the proposal and) from the review by national parliaments under Protocol No. 2. Gavin Barrett, ‘Monti II. The Subsidiarity Review Process Comes of Age... Or Then Again Maybe It Doesn't’ (2012) 19 *Maastricht journal of European and comparative law* 595, 600.

²⁰ Groussot and Bogojević at 237.

²¹ Ziller, ‘Le principe de subsidiarité’ at 529.

‘by reason of the scale or effects of the proposed action, be better achieved at Union level,’ whereas the ‘if’ and ‘in so far as’ in the subsidiarity formula enshrined necessity and proportionality *stricto sensu* respectively. Similarly, Louis maintains that subsidiarity takes into consideration elements of proportionality – the necessity of action at EU level – ‘without exhausting the content of the proportionality principle,’ the latter being excluded from the EWS, because it would have involved an assessment of the proposal’s substance.²²

A more complex understanding of the middle position is provided by Lenaerts, who maintains that subsidiarity can be understood in *sensu stricto* (‘if’ question) and *lato sensu* (‘in so far as’ question) terms.²³ Subsidiarity *lato sensu* involves a proportionality assessment, which, according to Lenaerts, implies that two expressions of the proportionality principle are at stake in Article 3b of the EC Treaty, current Article 5(3) TEU.²⁴ The use of ‘and in so far as’ with regard to EU action, both in the first version of the subsidiarity formula of the Maastricht Treaty as well as in its current Lisbon version, ‘indicates the permissible extent of such action’ (emphasis in original) and ‘makes it difficult to distinguish sharply between subsidiarity and proportionality.’²⁵ Yet, while the proportionality test involved in subsidiarity questions concerns only shared competences, the proportionality principle in general concerns all types of competence. In addition, the proportionality aspect involved in subsidiarity protects the sovereignty of Member States, whereas the general proportionality principle applies to values protected under EU law.²⁶

Against the overview of possible stances on the mutual relationship between principles expressed by the legal scholarship, Schütze’s understanding of Article 5 TEU presents the most systematized approach. Accordingly, the competence question is a ‘general “whether” of Union action’ which is answered by the policy area.²⁷ In other words, the competence question asks whether the EU can generally act in the area. In contrast, the focus of subsidiarity is on a specific act at stake. Furthermore, as Schütze puts forward, subsidiarity’s ‘whether’ question and proportionality’s ‘how’ question are tied together, which implies that

²² Jean-Victor Louis, ‘Quelques remarques sur l’avenir du contrôle du principe de subsidiarité’ in Aline De Walsche and Laure Levi (eds), *Mélanges en hommage à Georges Vandensanden: promenades au sein du droit européen* (Bruylant 2008) at 291 (own translation).

²³ Lenaerts at 875.

²⁴ Ibid at 883.

²⁵ Koen Lenaerts, ‘Subsidiarity and Community competence in the field of education’ (1994) 1 *Columbia Journal of European Law* 1, 3 and 25. Lenaerts argues that Art 3b contains in fact two expressions of the proportionality principle.

²⁶ Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism’, 884.

²⁷ Schütze, *From dual to cooperative federalism: the changing structure of European law* at 263.

subsidiarity has to be understood as ‘*federal proportionality*’.²⁸ Similar to Lenaerts, cited above, Schütze maintains that the distinction between these principles lies in the issues that they protect: the private rights of an individual in case of proportionality and the ‘collective autonomy’ of a group under subsidiarity.²⁹ From this, Schütze concludes that to draw a distinction between subsidiarity and proportionality, the latter, currently expressed in Article 5(4) TEU, should be restricted to safeguarding private rights against excessive public interference.³⁰ Hence, the relevant questions of Article 5 TEU can be summarized as follows: ‘the enumeration principle will tell us whether the Community *can* act within a policy field. The subsidiarity principle would examine whether a European law *disproportionately restricts national autonomy*; and the principle of proportionality would, finally, tell us whether a European law *unnecessarily interfered with liberal values*.’³¹

What is, therefore, the consequence of the Article 5 TEU construction for the EWS? Calliess argues that a proportionality violation limits the legislative competences of national parliaments in the same way as a subsidiarity encroachment. In his view, the ‘not always clean’ division between subsidiarity and proportionality in the jurisprudence of the ECJ also speaks in favour of the inclusion of a proportionality check within the EWS.³²

In practice, within the EWS, some national parliaments explicitly see proportionality as an inherent part of the subsidiarity test: ‘the proportionality aspect in the principle of subsidiarity.’³³ The Swedish Riksdag, in its analysis of the Commission proposal on the European single market for electronic communications, inquired whether the proposal ‘is suited to its purpose, and argue[d] instead that there are other and less intrusive ways than those considered by the Commission to secure a harmonised market for e-com services.’³⁴

Other examples show that the review of proportionality can be another, independent step of scrutiny. For example, the German Bundestag confirmed a violation of the proportionality principle in the Commission proposal on the Fund for European Aid to the Most Deprived ‘because its content and form far exceed[ed] what [was] necessary to achieve the objectives

²⁸ Ibid.

²⁹ Ibid.

³⁰ Ibid at 264.

³¹ Ibid.

³² Christian Calliess, ‘Subsidiaritätskontrolle durch Bundestag, Bundesrat und Landesparlamente, § 23’ in Winfried Kluth and Günter Krings (eds), *Gesetzgebung – Rechtsetzung durch Parlamente und Verwaltungen sowie ihre gerichtliche Kontrolle* (C.F. Müller 2013) at 580.

³³ Swedish Riksdag, Reasoned opinion of 7.11.2013 on COM(2013) 627.

³⁴ Ibid p.1.

of the treaties.’³⁵ The Greek parliament voiced reservations on the Tobacco Products directive, as the objective could be achieved by ‘means of milder measures’ rather than by banning flavoured or slim cigarettes.³⁶ The Polish Sejm found the Commission proposal on ‘Women on Boards’ in breach of the principle of proportionality, because ‘in order to achieve the directive’s objective it would suffice to adopt EU-wide measures aimed at standardising the criteria of appointing members of company boards, without the need to establish binding parities.’³⁷

These examples show that national parliaments understand subsidiarity and proportionality in a way that is different from Schütze’s proposal of ‘federal proportionality’: specifically, as a question of ‘whether the proposal is necessary to achieve the treaty objective’ or as a ‘less restrictive means test.’ It must be however noted that the Commission addresses the proportionality violations in its answers to national parliaments within the political dialogue. Nonetheless, the Commission maintains that proportionality analysis ‘goes beyond the scope of application of Article 6, Protocol No. 2.’³⁸ A similar approach has been taken with regard to cases in which the ‘yellow card’ was triggered.

1.2 Arguments in favour of a narrow reading of the EWS

The question posed by Weatherill on how to decide where reasoned opinions should end, invoked at the beginning of this chapter, about the scope of subsidiarity review, is *normative* in nature, but can be answered through a *textual, structural and functional* interpretation of the Treaties. This thesis advances a narrow understanding of the scope of the review that national parliaments ought to exercise in the framework of the EWS. It is argued that national parliaments should restrict their review of draft EU legislation under Protocol No. 2 exclusively to the control of the principle of subsidiarity; the concerns about the legal basis, proportionality or political merits of an EU legislative proposal should not be a part of the subsidiarity scrutiny.

³⁵ See, for example, German Bundestag, Reasoned opinion of 12.12.2012 on COM(2012) 617.

³⁶ Greek parliament, Reasoned opinion of 21.02.2013 on COM(2012) 788, similarly as in the opinion on COM(2013) 472 of 4.09.2013, p.4.

³⁷ Polish Sejm, Reasoned opinion of 4.01.2013 on COM(2012) 614.

³⁸ For example, Commission reply to Austrian Bundesrat of 13.2.2014 on COM(2013) 620, p.2.

1.2.1 Textual argument

First, a textual interpretation of Protocol No. 2 clearly shows that national parliaments may review the compliance of proposals solely with regard to the principle of subsidiarity.³⁹ While the preamble and the title of Protocol No. 2 refer to establishing the conditions for the application of the principles of subsidiarity and proportionality, the EWS, anchored in Article 7 of Protocol No. 2, refers exclusively to the principle of subsidiarity. Specifically, Article 1 of Protocol No. 2 provides that '[e]ach institution shall ensure constant respect for the principles of *subsidiarity* and *proportionality*,'⁴⁰ while Article 7 states that a national parliament shall specify 'why it considers that the draft in question does not comply with the principle of *subsidiarity*.'⁴¹ In turn, the Commission should answer to national parliaments by explaining 'why it considers that the proposal complies with the principle of *subsidiarity*.'⁴² In consequence, a textual interpretation of Protocol No. 2 indicates that national parliaments were granted a competence solely to review the compatibility of draft legislative acts with subsidiarity, and not to assess whether they are proportional, whether their legal basis is correct, or whether their political merits are sound.

1.2.2 Structural argument

Second, a structural argument backs the view that the function of national parliaments under Protocol No. 2 should be restricted to the control of the subsidiarity principle. The Lisbon Treaty did not grant national parliaments the position of a third legislative chamber in the EU structure, next to the European Parliament and Council. Indeed, while during the post-Nice period, a number of propositions regarding an independent role for national parliaments were discussed, these were discarded, both for national and EU-related reasons.⁴³

From the national level perspective, it was perceived that '[g]iven the increased importance of EC/EU affairs any stronger and direct participation of national parliaments on the EU level would affect the basic way national governments and parliaments function in general.' Such

³⁹ For a similar view see Schima at 373.

⁴⁰ Protocol No. 2, Art 1 (emphasis added).

⁴¹ Protocol No. 2, Art 7(2) and 7(3) (emphasis added).

⁴² Protocol No. 2, Art 7(3)(2) (emphasis added). On the contrary, Davies' textual interpretation that the 'obvious conclusion' from the wording of Protocol No. 2 (that Commission must provide justification on both subsidiarity and proportionality in the legal acts) is that 'proportionality is an element of subsidiarity', in addition, 'two concepts are obvious analogues – but might be useful, since proportionality is surrounded by more clarity and more accepted methodology than subsidiarity is; perhaps now one can learn from other.' See Davies at 693.

⁴³ See for example an overview in Maurer and Wessels, *National Parliaments on their Ways to Europe. Losers or Latecomers?* at 23.

an involvement of national parliaments was expected to ‘erode traditional patterns of policy making in our polities.’⁴⁴

From the EU-level perspective, the proposal of granting a co-legislative role to national parliaments was rejected, as it would have added another level of decision making, complicating even further the already complex EU law-making system.⁴⁵ The rejection of the idea of a ‘red card’ procedure, allowing national parliaments to veto EU legislation,⁴⁶ reflects the intent of the treaty framers to grant national parliaments only a narrow position in the EU legislative process, rather than broad powers of participation.⁴⁷ In fact, it was explained during the European Convention that the new mechanisms for subsidiarity scrutiny ‘should not make decision-making within the institutions more cumbersome or lengthier, nor block it.’⁴⁸ Indeed, the structure of the Treaties demonstrates a substantial ‘scepticism of the virtues of deeper direct involvement by national Parliaments in transnational law making.’⁴⁹ In consequence, it would be surprising if national parliaments could apply a broad review of Commission proposals under Protocol No. 2 to intervene in the EU law-making process; they were deprived of this function during the debates on treaty reform.⁵⁰ The works of the Convention could thus be seen as a historical argument elucidating the structural interpretation of the EWS and speaking in favour of a strict subsidiarity assessment.⁵¹ Indeed, Working Group I on the Principle of Subsidiarity proposed a narrowly defined EWS, without mentioning in its report a scrutiny of the aspects of proposals other than subsidiarity.⁵² As Protocol No. 2 to the Lisbon Treaty embraced the EWS without major changes to the respective Protocol of the Constitutional Treaty, the position of the original drafters about a

⁴⁴ Maurer and Wessels, ‘National Parliaments after Amsterdam: From Slow Adapters to National Players?’ at 464.

⁴⁵ Robert Uerpmann-Witzack and Andrea Edenharter, ‘Subsidiaritätsklage als parlamentarisches Minderheitsrecht?’ (2009) 44 *Europarecht* 313 Schütze, *From dual to cooperative federalism: the changing structure of European law* at 261.

⁴⁶ Patrick Birkinshaw, ‘A Constitution for the European Union? A Letter from Home’ (2004) 10 *European Public Law* 57, 73.

⁴⁷ See Barber, ‘Subsidiarity in the Draft Constitution’, 204.

⁴⁸ CONV 286/02, Point I (2).

⁴⁹ Stephen Weatherill, ‘Using national parliaments to improve scrutiny of the limits of EU action’ (2003) 28 *European law review* 909, 910 & 912.

⁵⁰ For analysis of the discussions of the role of national parliaments in the Convention on the future of Europe see Afke Groen and Thomas Christiansen, ‘National Parliaments in the European Union: Conceptual Choices in the EU’s Constitutional Debate’ in Claudia Heffler and others (eds), *The Palgrave Handbook on National Parliaments and the European Union* (Palgrave 2015 forthcoming).

⁵¹ See F. Mayer, *Stellungnahme zum öffentlichen Expertengespräch Prüfung des unionsrechtlichen Subsidiaritätsprinzips im Unterausschuss Europarecht des Rechtsausschusses des Deutschen Bundestages am 16. Juni 2010* (2010).

⁵² CONV 286/02, Section II (b).

limited role for national parliaments with a narrowly defined EWS seems a reliable basis for interpretation of the scope of the EWS.⁵³

1.2.3 Functional argument

Third, a functional interpretation, based upon a comparative institutional analysis, seems to guide in favour of a restrictive understanding of the role of national Parliaments under Protocol No. 2.⁵⁴ According to this approach, specific functions should be allocated among alternative institutions on the basis of their relative capacity to carry out the task. This approach does not exclude a situation in which a number of institutions fulfil one task.⁵⁵

National parliaments seem better suited than EU institutions for controlling the subsidiarity of a legislative proposal.⁵⁶ They are more eager to address the technical and political matters involved in the subsidiarity scrutiny. Since subsidiarity scrutiny ‘involve[s] a considerable margin of discretion for the institutions (considering whether shared objectives could ‘better’ be achieved at European level or at another level), monitoring of compliance with that principle should be of an essentially political nature.’⁵⁷ Since national parliaments are closer to citizens, ‘it was only natural to give them a role when it came to deciding whether

⁵³ Protocol on the Application of the Principles of Subsidiarity and Proportionality (O. J. 2004, C 310/207) did not foresee the ‘orange card’. Additionally, national parliaments had only six weeks to prepare a reasoned opinion (Article 6 of the proposed Protocol).

⁵⁴ For an introduction to comparative institutional analysis see Neil K Komesar, *Imperfect alternatives: choosing institutions in law, economics, and public policy* (University of Chicago Press 1994). Komesar compares institutions (market, courts and the political process) to choose which one among them is better able to decide on a specific social goal. This thesis applies Komesar’s analytical framework to decide which institution – the national political process, the EU political process or the EU adjudicative process – can comparatively better scrutinize legal and political aspects of EU legislative proposals.

⁵⁵ For example, as is argued below the correctness of legal basis is safeguarded *ex ante* by the Council and the EP and *ex post* by the ECJ.

⁵⁶ Allocation of the subsidiarity control to national parliaments was criticised by Davies, but for reasons connected to the weakness inherent in this principle. Garreth Davies, ‘Subsidiarity: the wrong idea, in the wrong place, at the wrong time’ (2006) 43 Common Market Law Review 63, 68-84. Davies labelled subsidiarity ‘the wrong idea, in the wrong place, at the wrong time.’ The ‘wrong idea’ argument meant that subsidiarity ‘instead of providing a method to balance between Member State and Community interest, which is what is needed, it assumes the Community goals, privileges their achievement absolutely, and simply asks who should be the one to do the implementing work. The ‘wrong place argument’ focused on the comparison between the Catholic church subsidiarity and the EU subsidiarity, claiming that in contrast to the former with its ‘clear hierarchy and common, undisputed goals’, in the latter we have two levels of legitimate law-makers with occasionally conflicting policies and interest. Hence, in contrast to the Catholic subsidiarity, it is not easy to decide on which objectives should take precedence. The ‘wrong time’ argument concerns the idea behind subsidiarity as fighting against over-detailed harmonization, whereas the ‘issues of the day’ are the EU powers encroaching on sensitive national areas, such as criminal law or economic policy. In the view of Davies, a mechanism more apt to deal with the competence creep was ‘true proportionality’ to be adjudicated by the ECJ, involving ‘an intelligent balance’ between Community and national interests/values. For the criticism of this approach see Craig, ‘Subsidiarity: A political and legal analysis’, 82-84.

⁵⁷ CONV 286/02, point I(5).

legislation was best adopted at national or supranational level.’⁵⁸ In addition, the European Court of Justice is blamed for ‘not taking subsidiarity seriously’ and the ‘low-intensity of judicial review’ of that principle is highlighted.⁵⁹

In contrast to the suitability of national parliaments for conducting subsidiarity review, other institutions participating in the EU law-making process are more apt than national parliaments to evaluate the content of a legislative draft, its proportionality or whether it has the correct legal basis.

To start with, it seems unquestionable that the EU legislative institutions can assess the merits of a legislative proposal better than the national parliaments. The EU political process, by involving multiple institutions (the Commission, the Council and, usually, the EP) guarantees a more comprehensive consideration of all the interests involved. In contrast, national parliaments, because of their local focus, may reflect a ‘minoritarian bias,’ failing to take into account the broad problems at stake.⁶⁰ The reasoned opinion of the Maltese parliament on the European single market for electronic communications illustrates this point well.⁶¹ Arguing under the EWS against the Commission proposal, this chamber raised its concerns about the principle of subsidiarity, as ‘[f]or various reasons, such as the size of the country, its geographical legislation and the level of competition based on infrastructure, the Maltese market is different from markets in other Member States, and thus may require different measures.’⁶² In sum, leaving the discussion on the merits of the Commission’s proposal to the EU legislator avoids the drafting of reasoned opinions focusing on the local situation in the Member State, instead of looking for the level which can better exercise the treaty objectives.

Similarly, EU institutions seem more apt than national parliaments in protecting the proportionality principle. A proportionality assessment involves an assessment of the necessity of a measure, its adequacy to achieve a desired goal and its conciliation with

⁵⁸ European Convention, Working Group IV on National Parliaments, Summary of the meeting held on 19 July 2002, CONV 204/02, 16.07.2002, point 2.

⁵⁹ Craig, ‘Subsidiarity: A political and legal analysis’, 80; Giuseppe Martinico, ‘Dating Cinderella: On subsidiarity as a political safeguard of federalism in the European Union’ (2011) 17 *European Public Law* 649; Andrea Biondi, ‘Subsidiarity in the Courtroom’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU law after Lisbon* (Oxford University Press 2012).

⁶⁰ Komisar approaches the political process through a two-force model of majoritarian and minoritarian influences. The former one tends to produce public policies that are less narrow than the once resulting from the latter. The overrepresentation of one of the forces results in a majoritarian or minoritarian bias which has a serious impact on the outcomes of the political process.

⁶¹ COM(2013) 627.

⁶² Maltese House of Representatives, Reasoned opinion of 7.11.2013 on COM(2013) 627, point 2.

competing interests (the ‘least restrictive means’ test).⁶³ Identifying and balancing these interests ascribes them some values.⁶⁴ Likewise in this case, since the EU political process allows for the voicing of multiple interests (including the interests of the Member States, as represented by their ministers in the Council) it seems that the proportionality oversight can be better conducted through an interaction between the various EU institutions, rather than via individual evaluation by each national parliament. In addition, because the judicial process is characterised as an independent institution, the ECJ is fitter to conduct value assessments involved in the proportionality test without a single national bias.⁶⁵

Third, the functional interpretation shows that EU institutions are better equipped than national parliaments in reviewing the legal basis of a legislative measure.⁶⁶ The legal basis question asks whether the Union possesses the powers that it seeks to exercise.⁶⁷ The ECJ - the final interpreter of the EU Treaties - with an explicit function of reviewing the legality of EU legislative acts, seems better endowed with the technical expertise concerning EU law which is needed to review whether the EU has the power to act within a certain domain.⁶⁸ The argument that national parliaments should scrutinize the principle of conferral under the subsidiarity review because the ECJ has not constituted a sufficient safeguard, can be rejected, since in a number of significant decisions ‘the ECJ has adjudicated on the vertical competences, and not always favourably for the Union’ as was the case in the Tobacco Advertising judgment.⁶⁹ In order to avoid single-institutionalism and provide for an ex-ante check on the legal basis, alongside the ECJ, the EP and the Council often provide expertise in this respect. This power has been granted to them directly by the respective rules of procedure, which also contrasts with the lack of such a function in Protocol No. 2, as presented by the textual argument.⁷⁰

⁶³ Alec Stone Sweet and Jud Mathews, ‘Proportionality balancing and global constitutionalism’ (2008) 47 *Columbia journal of transnational law* 72.

⁶⁴ Paul Craig, *EU administrative law* (Oxford University Press 2012) at 592.

⁶⁵ Komesar indicates three distinctive aspects of the adjudicative process: competence (ability to assess complex cases), scale (ability to review cases) and independence (ability to be take even-handed decisions). Komesar, at 123.

⁶⁶ Also on this issue, see Chapter 6.

⁶⁷ Lenaerts, ‘The Principle of Subsidiarity and the Environment in the European Union: Keeping the Balance of Federalism’, 866.

⁶⁸ See Art 263 TFEU.

⁶⁹ Armin von Bogdandy and Jürgen Bast, ‘The European Union's vertical order of competences: The current law and proposals for its reform’ (2002) 39 *Common Market Law Review* 227, 257.

⁷⁰ According to Rule 37 of the European Parliament Rules of Procedure, first the committee responsible for the subject-matter verifies the legal basis of a legislative act and in case when it is the validity or the appropriateness is disputed an opinion of the committee responsible for the legal affairs should be requested, which may also conduct such a scrutiny on its own motion. In the Council, it is the task of the COREPER to safeguard the observance of the principle of legality (Article 19 (1) Council Rules of Procedure).

1.3 National insufficiency test and the comparative efficiency test

All of the arguments raised above support a narrow subsidiarity review. Thus, national parliaments, in the exercise of their powers under Protocol No. 2, should limit themselves to the subsidiarity scrutiny of draft legislative acts. In particular, the content of such restrictive scrutiny should consist of two aspects: the material and the procedural dimensions of the principle of subsidiarity.⁷¹ The material dimension of subsidiarity can be verified from two angles, labelled by Schütze as the *national insufficiency test* and the *comparative efficiency test*. The first test – the Union shall act ‘only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States’ – means that a Member State has ‘inadequate means at its disposal for achieving the objectives of the proposed action.’⁷² The second test demands that the Union shall act if the objectives of the proposed action can rather ‘by reason of the scale or effects of the proposed action, be better achieved at Union level.’ Hence, the EU should not act ‘unless it could *better* achieve the objectives of the proposed action.’⁷³

Calliess, similarly, calls the two tests the ‘negative’ and ‘positive’ criteria, respectively.⁷⁴ The ‘negative criterion’ concerns the insufficiency of Member State action, whereas the ‘positive criterion,’ to be checked only if the first is confirmed, implies a comparative cost-benefit analysis at the different levels of government (including the ‘null option’ of EU inaction).⁷⁵

Chalmers et al. have also reflected on the two subsidiarity tests, and indicated that the first part of Article 5(3) TEU concerning the insufficiency of national action refers to the ‘Member State’s sense of self-government, and what it believes it can do itself. This goes to wider issues than legal effectiveness such as how far a measure forms part of a wider valued tradition.’⁷⁶ The second test inherent in the subsidiarity principle is a ‘federal’ one: ‘whether one central measure would be more effective than twenty-eight different ones.’⁷⁷

⁷¹ Estella De Noriega at 105. The material and procedural criterion was developed by Estella in the context of the Amsterdam Protocol, but could be also applied for the Treaty of Lisbon as there were no major textual changes from one to the other.

⁷² Lenaerts, ‘Subsidiarity and Community competence in the field of education’, 22.

⁷³ Schütze, *From dual to cooperative federalism: the changing structure of European law* at 250.

⁷⁴ Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* at 104. Relates to Maastricht formulation of Article 5.

⁷⁵ Ibid at 104 & 116.

⁷⁶ Damian Chalmers, Gareth Davies and Giorgio Monti, *European Union law: cases and materials* (Cambridge University Press 2014) at 395.

⁷⁷ Ibid.

National parliaments have adopted their own labels for the parts of the subsidiarity test. The UK House of Commons⁷⁸ in its reasoned opinions conducts a subsidiarity test, the first limb of which consists of a ‘necessity test’ (whether the EU Commission has established that legislative action at EU level is necessary at all) and ‘insufficiency of Member State action test’, which requires the Commission to prove that the action proposed cannot be sufficiently achieved by the Member States.⁷⁹ The second limb is whether the ‘action is better achieved at EU level’, which requires the Commission to provide evidence that the objective of the proposal ‘would be better achieved, by reason of its scale or effects, by action at EU level.’⁸⁰

The Irish parliament indicates that Article 5(3) TEU constitutes a ‘comparative efficiency exercise’, involving a ‘necessity test’ and a ‘greater benefits test.’⁸¹ Within the necessity limb, the parliament attempts to answer the question whether ‘the action by the EU [is] necessary to achieve the objective of the proposal’ and whether ‘the objective of the proposal [can] only be achieved, or achieved to a sufficient extent, by EU action.’ The ‘greater benefits test’ asks, in turn, whether the objective would be better achieved at EU level – ‘i.e. would EU action provide greater benefits than action at Member State level?’ In addition, every new draft legislative act should be ‘supported by a sufficiently “detailed statement”’ on compliance with subsidiarity, and should be compatible with Article 5(2) TEU.⁸²

The problem of labelling the ‘national insufficiency test’ as a ‘necessity test’ is that it may cause confusion with the ‘necessity test,’ which is a part of the proportionality principle expressed in Article 5(4) TEU. This provision states that ‘the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties.’ For example, the Irish parliament, asks as a first part of its subsidiarity test, the following question: ‘[i]s action by the EU necessary to achieve the objective of the proposal?’⁸³ Such questions should be dealt with only in the sense of ‘federal proportionality’ as suggested by Schütze: whether the EU law disproportionately restricts national autonomy, but not whether the action is necessary to achieve a Treaty objective.

Besides the possible confusion with the ‘necessity test’ inherent in the proportionality principle, a question as to whether any action is ‘necessary at all’ is often addressed as a

⁷⁸ The UK government sees necessity and proportionality as tests different to that of subsidiarity See correspondence between Lord Boswell and the Secretary of State for Justice C. Grayling of 20.01.2014.

⁷⁹ UK House of Commons, Reasoned opinion of 12.02.2014 on COM(2013) 893, point 17 and 19.

⁸⁰ Ibid point 21.

⁸¹ Irish Houses of Oireachtas, Reasoned opinion of 6.11.2013 on COM(2013) 627.

⁸² Ibid p.1.

⁸³ Ibid.

subsidiarity issue. However, this is not a question about the right level of governance, because at the subsidiarity level, we assume that some kind of action must be taken, and we decide on the more appropriate level of government. For example, the UK House of Commons, which notoriously checks the necessity of Commission proposals, states that ‘necessity is a pre-requisite both for action at EU level and for conformity with the principle of subsidiarity.’⁸⁴ However, the ‘necessity’ question in the meaning implied by the House of Commons comes before subsidiarity, and is decided upon by the Commission. It is a *policy* question, and one that is not to be answered within the subsidiarity test.⁸⁵

The question is also how many Member States in which the achievement of an action would be ‘insufficient’ is necessary to fulfil the ‘national insufficiency test.’ In fact, national parliaments often underline in their reasoned opinions that the proposal violates the subsidiarity principle because they can achieve the objective on their own or that they already have some mechanisms implemented in this regard. For example, in reaction to the Commission proposal on periodic testing for motor vehicles and their trailers, the Swedish Riksdag underlined in its reasoned opinion that the system operating in Sweden is ‘well organized and adapted to maintain high levels of road safety among the various vehicles used on the roads.’⁸⁶ In the same vein, both the Dutch Tweede and Eerste Kameren argued that this Commission proposal ‘intervenes in well functioning systems of the Member States.’⁸⁷

While these examples may show that the periodic testing for motor vehicles and their trailers works well in Sweden or in the Netherlands, how many Member States’ opinions do we need in order to prove that ‘the objectives of the proposed action cannot be sufficiently achieved by the Member States’? Edward argues that the smaller Member States ‘may not have financial and other resources ‘sufficient’ to achieve the objective in question,’ and in such cases, limiting of the autonomy of larger Member States in order to achieve an objective Union-wide is ‘presumably’ justified.⁸⁸ Lenaerts sees it in a much more straight-forward way: ‘a necessary condition for Community action is that at least one Member State has inadequate means at its disposal for achieving the objectives of the proposed action.’⁸⁹ Calliess applies a

⁸⁴ UK House of Commons, Reasoned opinion of 22.05.2012 on COM(2012) 130.

⁸⁵ See however N. Emiliou, who argues that ‘proportionality is concerned with the question whether Community action is necessary *at all*.’ (emphasis added). Nicholas Emiliou, ‘Subsidiarity: An Effective Barrier Against the Enterprises of Ambition?’ (1992) 17 European law review 383, 402.

⁸⁶ Swedish Riksdag, Reasoned opinion of 17.10.2012 on COM(2012) 380, p.1.

⁸⁷ Dutch Tweede Kamer, Reasoned opinion of 9.10. 2012 and Eerste Kamer of 11.10.2012 at 4 on COM(2012)380.

⁸⁸ Edward at 100. Edward sees the Court as not ‘well equipped’ to answer this question.

⁸⁹ Lenaerts, ‘Subsidiarity and Community competence in the field of education’, 22.

textual interpretation of Article 5(3) TEU – which refers to Member States (in the plural) – hence the potential to perform the objective by two or more Member States must be objectively insufficient in order for the EU to act.⁹⁰ It needs to be checked independently whether the objective of the measure can be achieved through the unilateral action of a single, multiple or all the Member States (acting independently).⁹¹ In practice, the test proposed by Calliess appears to be consistent with that of Lenaerts if the objective of the measure is such that it cannot be achieved unless all Member States take action. This seems to be the case for many EU proposals. For example, the objective of the proposal on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings⁹² states as its objective ‘common minimum rules for certain aspects of the right to presumption of innocence.’ If a single Member State did not adopt these standards, the overall objective would be violated.

Another question is if the subsidiarity principle bars the EU from acting when Member States could achieve the objective by acting in a form of an intergovernmental cooperation. According to Toth, the textual interpretation of the Maastricht Treaty permitted the conclusion that the EU should not act in such a case; however such an approach would present ‘a major step backwards in the process of integration.’⁹³ The Treaty of Lisbon abolished the three pillar structure, in favour of creating the EU, yet the intergovernmental method is maintained for the Common Foreign and Security Policy and in the area of police and judicial cooperation in criminal matters where Member States still possess significant powers. However, Toth’s argument remains valid with regard to boosting the process of EU integration. For example, the Lisbon Treaty provides that enhanced cooperation can be undertaken only as ‘a last resort, when it has established that the objectives of such cooperation cannot be attained within a reasonable period by the Union as a whole.’⁹⁴ Hence to answer the initial question of whether the EU should not act when Member States could proceed in a form that is binding only for a group of them, it seems that this is only a further possibility in cases allowed by the Treaty where Member States could not agree in the Council.

⁹⁰ Calliess, ‘Subsidiaritätskontrolle durch Bundestag, Bundesrat und Landesparlamente, § 23’ at 566.

⁹¹ Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* at 112.

⁹² COM(2013) 821.

⁹³ Toth, ‘The principle of subsidiarity in the Maastricht Treaty’, 1099.

⁹⁴ Art 20(2) TEU.

1.4 Cross-border activity test

Furthermore, the subsidiarity assessment can be enriched by the ‘cross-border activity’ test. The Amsterdam Protocol indicated this test as a guideline to justify action at the EU level.⁹⁵ In practice, as indicated in Chapter 1, the Amsterdam criteria are still applied by the Commission and some national parliaments. A prominent example of the application of the ‘cross-border test’ in the subsidiarity review is the *Vodafone* case.⁹⁶ According to Advocate General Maduro, action should be taken at EU level whenever the EU has ‘a special interest in protecting and promoting economic activities of a cross-border character,’ and ‘the national democratic process is likely to fail to protect cross-border activities.’⁹⁷ Generally speaking, the EU should take action in cases where the transnational dimension of an issue which national process may fail to regulate, which will in turn increase the added value of EU legislative intervention.⁹⁸

However, this test is less helpful in the assessment of proposals which do not regulate a cross-border situation. For example, as Chapter 8 on the application of the EWS to the ‘genuine’ fundamental rights proposals (meaning those that pursue a fundamental rights objective) shows, the transnational element might not be present. Nonetheless, in such cases, the subsidiarity principle will still apply. Yet, because the focus of fundamental rights protection is on safeguarding values, conducting an efficiency test involved in subsidiarity reasoning might not be easily applicable, as such tests reduce fundamental rights to bare economic calculations. Issues such as the local boundaries of the political process, the political legitimacy of one of the government levels, and the willingness to act, must be taken into account within the subsidiarity assessment in this case. It is hence still the ‘special interest’ that should be protected, as in the *Vodafone* case, but not necessarily involving a cross-border element.

⁹⁵ Art 5, Subsidiarity Protocol attached to the Amsterdam Treaty.

⁹⁶ Case C-58/08 *Opinion of Advocate General Poiares Maduro in Vodafone and others* [2009] ECLI:EU:C:2009:596.

⁹⁷ *Ibid* para 34.

⁹⁸ The cross-border character of an activity implying a need for an EU level regulation is not always obvious. For example, AG Maduro in the *Vodafone* case differentiates between the justification for the harmonisation of the wholesale and retail roaming prices. Whereas few could dispute that the wholesale roaming price had a cross-border character, it was argued by some that the retail prices could have been regulated at the national level once the wholesale prices were harmonised. However, as AG Maduro explained, EU level regulation of the retail prices was needed, as the retail roaming prices were just a small part of domestic communications and the national regulators might have failed to protect this cross-border activity.

1.5 Procedural subsidiarity

Finally, the procedural aspect of the subsidiarity principle relates to the motivation of a legislative proposal, and can be regarded as instrumental to the evaluation of the material subsidiarity.⁹⁹ As Article 5(3) TEU states, in the subparagraph which is cited less often, '[t]he institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the applications of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in the Protocol.' In other words, this provision indicates that it is for the EU institutions to apply subsidiarity and for national parliaments to control it.¹⁰⁰ In accordance with Article 5(3) TEU, the 'application' of subsidiarity by EU institutions is further elaborated upon in Article 5 of Protocol No. 2. Therefore, draft legislative acts 'should contain a detailed statement' allowing for the appraisal of 'compliance with the principles of subsidiarity and proportionality.'¹⁰¹ Such a statement should contain the following parts: an 'assessment of the proposal's financial impact'; and 'in the case of a directive, of its implications for the rules to be put in place by Member States, including, where necessary, the regional legislation.' In addition, the '[t]he reasons for concluding that a Union objective can be better achieved at Union level shall be substantiated by qualitative and, wherever possible, quantitative indicators.' Interestingly, reference is thus made only to the 'comparative efficiency test.'

It is therefore visible that the 'onus to justify' legislative proposals rests on the EU institutions.¹⁰² In fact, Groussot and Bogojević perceive the obligation for the Commission to justify its proposals with regard to compliance with subsidiarity and proportionality as 'the second competence-based tool' in the subsidiarity monitoring procedure, next to the subsidiarity scrutiny by national parliaments in the EWS.¹⁰³ Accordingly, the Commission evaluates the compatibility of its proposals with the principle of subsidiarity in the roadmaps prepared for major initiatives, in the impact assessments, explanatory memorandums and recitals of the proposal preamble.¹⁰⁴ However, Wyatt argued that the Commission has never been 'sympathetic to the principle of subsidiarity,' and has had a 'desire to minimize the

⁹⁹ See Estella De Noriega at 132.

¹⁰⁰ This view presented also by the UK House of Commons, see House of Commons, Reasoned opinion of 11.11.2013 on COM(2013) 618, 619, point 11.

¹⁰¹ B. Schima points out that Art 5 of Protocol 2 because of the use of 'shall' is rather a recommendation than obligation. Cf. Schima at 382.

¹⁰² de Búrca, 'Re-appraising subsidiarity's significance after Amsterdam', 8.

¹⁰³ Groussot and Bogojević at 235.

¹⁰⁴ Commission report, COM(2012) 373 at 3. On the utility of impact assessments for taking subsidiarity seriously, especially in order to facilitate the judicial review, see Craig, 'Subsidiarity: A political and legal analysis', 77.

practical effect of subsidiarity.’¹⁰⁵ This is why, in his view the assessments of the compatibility of the legal act with the principle of subsidiarity are ‘often perfunctory, in many cases simply stating that the requirements of subsidiarity are complied with.’¹⁰⁶ The justifications given by the Commission are more ‘a statement of the rationale of the legislation itself,’ than a justification for compliance with subsidiarity.¹⁰⁷

Despite such critical voices the increased use of the impact assessments in the pre-legislative phase has been seen as a ‘move towards proceduralization’ in the subsidiarity monitoring.¹⁰⁸ Impact assessments are rooted in the ‘second-competence based tool.’¹⁰⁹ However, national parliaments also refer to impact assessments in their reasoned opinions, which would show some overlap between the two tools presented by Groussot and Bogojević – the EWS and the impact assessments.¹¹⁰

As impact assessments are not translated into all languages, national parliaments may have to rely on the explanatory memorandum included in the draft legislative acts; the latter being far shorter and less elaborative than the former. In consequence, national parliaments may consider the justifications given in explanatory memoranda as not constituting a sufficient qualitative and quantitative substantiation of the compliance with the subsidiarity principle as foreseen by Protocol No. 2.¹¹¹ Moreover, the EP has proposed a few improvements to the Commission impact assessments, asking the Commission to analyse its methodology and insisting that the principle of multilingualism should apply to impact assessments relating to vital aspects of public and political opinion.¹¹²

While the *onus probandi* weighs upon EU institutions, it would be desirable if national parliaments’ criticism were substantiated by pointing out the loopholes in the Commission

¹⁰⁵ Derrick Wyatt, ‘Is the European Union an Organisation of Limited Powers?’ in Anthony Arnall and others (eds), *A Constitutional Order of States? Essays in EU Law in Honour of Alan Dashwood* (Hart 2011) at 18.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid at 19.

¹⁰⁸ Groussot and Bogojević at 235.

¹⁰⁹ Ibid at 242. While Groussot and Bogojević acknowledge that a number of reasoned opinions criticised insufficient justification of Commission proposals (at 240), they separate the EWS from impact assessments as two different ‘competence-based tools.’ On the one hand, also the reasoned opinions often refer to the insufficient explanatory memoranda which may make the differentiation between the two tests not that clear-cut. On the other hand, the significance of impact assessments for Groussot and Bogojević seems to lay more in the judicial review of EU measures (at 243).

¹¹⁰ See UK House of Commons, Reasoned opinion of 21.05.2013 and the Romanian Chamber of Deputies, Reasoned opinion of 28.05.2013 on COM(2013)147.

¹¹¹ See for example House of Commons, Reasoned opinion of 11.11.2013 on COM(2013) 618, 619, points 10 and 12.

¹¹² European Parliament resolution of 4 February 2014 on EU Regulatory Fitness and Subsidiarity and Proportionality – 19th report on Better Lawmaking covering the year 2011, P7_TA(2014)0061, point 42-50.

argumentation.¹¹³ Good reasoned opinions not only *argue* that the national level is sufficient, but *show* why the national level is sufficient or even better than the Union one.¹¹⁴

2 The second ‘yellow card’ on the EPPO proposal

After Section 1 elaborated on different aspects of the EWS, especially its scope and the specific tests involved, Section 2 will explore in detail how these theoretical aspects of the EWS apply to real cases. In the following part, I will explore in detail the second ‘yellow card’ triggered by national parliaments. First, I briefly explain the background of the Commission proposal. The second section provides the content of the proposal. Next, I summarise the main concerns of national parliaments with regard to the Commission proposal. Finally, in the last section, I comment on the outcome of the second ‘yellow card’ comparing it with the first one. There, I re-assess the scope of the subsidiarity review and its consequence for this procedure in the light of this example.

2.1 Background

The idea of the European Public Prosecutor (EPP) has been discussed since the 1990s, and received renewed interest with the financial crisis; the issue of the management of public money and the duty to bolster the EU budget emerged during the course of the debates on the Office.¹¹⁵ The first ideas concerning the EPPO were connected to the *Corpus Juris*, a project of experts, academics and practitioners, carried out independently from EU institutions, which set a model for substantive and procedural criminal law, focusing solely on the protection of the financial interests of the EU, and included provisions on the Public Prosecutor.¹¹⁶

The Commission already supported the idea of an EPPO at the Intergovernmental Conference in Nice in 2000. However, due to a lack of time and detailed study concerning the topic, it did not make it into the Nice Treaty.¹¹⁷ The Eurojust proposal, which was seen as an intergovernmental ‘Trojan Horse,’ cast the ‘more integrationist’ EPPO in the shadows.¹¹⁸ In face of its failure, the Commission prepared a Green Paper in order to launch a larger debate

¹¹³ See for example UK House of Lords, Reasoned opinion of 1.11.2013 on COM(2013) 618, point 14.

¹¹⁴ Ibid point 13.

¹¹⁵ Katalin Ligeti and Michele Simonato, ‘The European Public Prosecutor’s Office: Towards a Truly European Prosecution Service?’ (2013) 4 New Journal of European Criminal Law (NJECL) 7, 10.

¹¹⁶ Ladislav Hamran and Eva Szabova, ‘European Public Prosecutor’s Office – Cui Bono?’ (2013) 4 New Journal of European Criminal Law (NJECL) 40, 41.

¹¹⁷ Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2001)715, 11.12.2001, at 6.

¹¹⁸ Valsamis Mitsilegas, *EU criminal law* (Hart 2009) at 189.

on the EPPO prior to the next treaty changes.¹¹⁹ The *Corpus Juris* project not only ‘provided a direct impulse for the drafting of the Green Paper,’ but also ‘can be seen in all of the formulations and proposals [of the Commission], which are often very similar, and sometimes identical [to the *Corpus Juris*].’¹²⁰ The Green Paper provoked a broad response from practitioners and scholars, which the Commission addressed in the ‘Follow-up report on the Green Paper,’ with a view to the forthcoming revision of the treaties.¹²¹ Nonetheless, as Article III-274 of the Constitutional Treaty, which incorporated the EPP, never entered into force, it was only the Lisbon Treaty that included a legal basis enabling the creation of the office. Article 86 TFEU should be hence seen as a ‘major success, signifying a genuine step towards the creation of a European Public Prosecutor.’¹²²

Article 86(1) TFEU provides that:

‘In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust. The Council shall act unanimously after obtaining the consent of the European Parliament.’

As explained by Peers, the expression ‘from Eurojust’ means that ‘there would have to be a link between the two bodies, although in the absence of more precise Treaty rules there is a degree of discretion as to how close the link would have to be.’¹²³ Nonetheless, taking into account the entangled history of both proposals, establishing the EPP ‘from Eurojust’ might be seen as ironic.¹²⁴

The Lisbon Treaty allows the EU Legislator to grant the EPPO powers to investigate, prosecute and bring to judgment the perpetrators of, and accomplices in, offences against the Union’s financial interests.¹²⁵ Where suitable, the EPPO should act in liaison with Europol. In addition, the EPPO exercises the functions of a prosecutor in the competent courts of the Member States in relation to offences against the EU’s financial interests.

¹¹⁹ Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor.

¹²⁰ Hamran and Szabova at 43.

¹²¹ Follow-up report on the Green Paper on the criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor, COM(2003)128, 19.3.2003, at 4.

¹²² Hamran and Szabova at 46.

¹²³ Steve Peers, *EU justice and home affairs law* (Oxford University Press 2011) at 818. Cf. A list of possible interpretations of the notion ‘from Eurojust’ in Hamran and Szabova at 46.

¹²⁴ Mitsilegas at 189.

¹²⁵ See Article 86(2) TFEU.

The functioning of the EPPO is to be regulated by an EU regulation mentioned in Article 86(1) TFEU. This regulation should aim to create ‘general rules applicable to the European Public Prosecutor’s Office, the conditions governing the performance of its functions, the rules of procedure applicable to its activities, as well as those governing the admissibility of evidence, and the rules applicable to the judicial review of procedural measures taken by it in the performance of its functions.’¹²⁶

The EPPO can be established via the special legislative procedure, with the Council acting by unanimity, and with the consent of the EP.¹²⁷ Within EU criminal law, it is the only case of use of the special legislative procedure.¹²⁸ In case there is no unanimity in the Council on the establishment of the EPPO, the regulation can be referred to the European Council, where the proposal shall be discussed, while being suspended in the Council.¹²⁹ If the European Council reaches consensus on the draft within four months of the suspension, it must to be forwarded to the Council for adoption.

A ‘particular feature’ of the EPPO provision is the enhanced cooperation procedure that may be launched by a group of at least nine Member States when the Council does not reach a unanimous decision.¹³⁰ It should be launched on the basis of the proposed regulation within four months after the suspension of the procedure in the Council and notified to the EP, the Council and the Commission.

In addition, the European Council may unanimously extend the EPPO’s powers to cover ‘serious crimes affecting more than one Member State,’ with the consent of the EP and following consultation with the Commission.¹³¹

Before the Commission introduced its proposal, EU scholarship criticised the necessity of the EPP proposal. Peers described the EPP as a ‘fundamentally flawed’ means of defending EU financial interests, together with securing the fundamental rights of criminals.¹³² Accordingly, there are ‘more limited measures which can achieve the same objective;’ such as the development of the European Arrest Warrant, which help to protect fundamental rights and

¹²⁶ Art 86(3) TFEU.

¹²⁷ Art 86(1) TFEU paragraph 2. The unanimity requirement in the Council may be changed to QMV according to the general passarelle of Art 48(7) TEU: the European Council may a decision allowing to change to the ordinary legislative procedure, which is notified to national parliaments. They may oppose to the change within six months and then the decision is not adopted.

¹²⁸ Cf. Peers at 815.

¹²⁹ Art 86(1) paragraph 2.

¹³⁰ Peers at 815.

¹³¹ Art 86(4) TFEU.

¹³² Peers at 859.

the departure from the dual criminality principle in cases of crimes against the EU's financial interests. Moreover, Peers branded the EPP model as 'half baked'; investigation and prosecution should not be separated from trial; centralization of the first and decentralization of the latter may compromise the protection of fundamental rights of criminal defendants.¹³³

2.2 Content of the EPPO proposal

After the entry into force of the Lisbon Treaty, the Commission proposal that would establish a European Public Prosecutor's Office was first mentioned in the Stockholm Programme.¹³⁴ In July 2013, the Commission proposed the draft Council regulation 'on the establishment of the European Public Prosecutor's Office.' The introduction of the draft proposal was perceived as a move from an 'if,' in the sense that 'it is no longer a taboo for national policy makers and practitioners to explore establishing such an office,' to a 'how' question focusing on 'what the EPPO should look like.'¹³⁵

The 'how' of the EPPO draft proposal is presented in the following section, highlighting the issues that were picked up by national parliaments. Hence, the Explanatory Memorandum to the proposal first highlights the compliance with Article 5 TEU: conferral, subsidiarity and proportionality principles. Concerning the substance of the proposal, the central parts concern the structure of the EPPO; the appointment of the Office; legal principles central to the activities of the office; the competences of the EPPO; rules of procedure on investigations, prosecutions and trial proceedings; procedural safeguards; judicial review and relations with other institutions, especially Eurojust.

With regard to the *legal basis* of the proposal, the Commission stated that it is anchored in Article 86 TFEU, citing the text of the provision without further explanations.¹³⁶ Probably because the EPPO is explicitly foreseen in the TFEU, the Commission saw the legal basis issues as self-explanatory. On *subsidiarity*, the proposal elaborated more, and specified that 'the foreseen action has an intrinsic Union dimension' which entails 'Union-level steering and coordination of investigations and prosecutions of criminal offences affecting its own financial interests, the protection of which is required both from the Union and the Member States by Articles 310(6) and 325 TFEU.'¹³⁷ This objective, in the view of the Commission,

¹³³ Ibid at 860.

¹³⁴ The Stockholm Programme – An open and secure Europe serving and protecting citizens, OJ C 115, 4.5.2010, p. 1–38, Point 3.1.1.

¹³⁵ Ligeti and Simonato at 21.

¹³⁶ Explanatory Memorandum, point 3.1.

¹³⁷ Ibid point 3.2.

‘can only be achieved at Union level by reason of its scale and effects.’ In consequence, according to the Commission, the current situation where national authorities are solely responsible for the prosecution of offences against the Union’s financial interests ‘is not satisfactory and does not sufficiently achieve the objective of fighting effectively against offences affecting EU budget.’ Whereas in fact the Commission argues in the earlier section of the Explanatory Memorandum that Member States are ‘unable to achieve an equivalent level of protection and enforcement,’ no qualitative or quantitative data is cited in support of this claim.¹³⁸ Finally, with regard to compliance with the *proportionality* principle, the Commission argued that the measures are ‘least intrusive for the legal orders and the institutional structures of the Member States.’¹³⁹

With regard to the *institutional set-up* of the proposal, the Commission designs the EPPO as a ‘decentralised structure,’¹⁴⁰ specifying in the Explanatory Memorandum that EPPO is a decentralised *integrated* office.¹⁴¹ The EPPO consists of the European Public Prosecutor (EPP) assisted by four Deputies.¹⁴² The investigations and prosecutions are however conducted by European Delegated Prosecutors (EDPs) under the ‘direction and supervision’ of the EPP.¹⁴³ The EDPs will wear a so-called ‘double hat.’ On the one hand, every Member State will have one European Delegated Prosecutor, who will remain an ‘integral part’ of the EPPO and will act under the ‘exclusive authority of the EPP, remaining ‘fully independent from the national prosecution bodies.’¹⁴⁴ On the other hand, the EDPs can also fulfil the function of national prosecutors.¹⁴⁵

The Council, by a simple majority, *appoints* the EPP for a single eight-year term.¹⁴⁶ The candidate should be chosen in an open call for candidates, his or her independence should be beyond doubt, and she should possess the qualifications for appointment to high judicial office, as well as having relevant experience as a prosecutor.¹⁴⁷ The candidates for the EDPs are appointed for a renewable term of five years by the EPP from the candidates proposed by

¹³⁸ Ibid point 1. See however more elaborated subsidiarity statement in the Impact Assessment Commission Staff Working Document. Impact Assessment Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, SWD(2013)274, 17.7.2013, at 25-27.

¹³⁹ Explanatory Memorandum, point 3.2.

¹⁴⁰ Art 3(1) of the proposal.

¹⁴¹ Explanatory Memorandum, point 2. [emphasis added]

¹⁴² Art 6(1), (2) of the proposal.

¹⁴³ Art 6(3) of the proposal.

¹⁴⁴ Art 6(5) of the proposal.

¹⁴⁵ Art 6(6) of the proposal.

¹⁴⁶ Art 8(1) of the proposal.

¹⁴⁷ Art 8(2)-(3) of the proposal. Similar rules apply to the Deputies of the European Public Prosecutor. See also Art 9 of the proposal.

Member States.¹⁴⁸ Similarly to the EPP, the candidates for EDPs should be qualified to serve at a high judicial office and have relevant prosecutorial experience. Moreover, if at the time of the appointment, the EDP is not a prosecutor under national law, the Member State will have to appoint the candidate to that position.¹⁴⁹

The *basic principles* that are fundamental to the activities of the EPPO include: respect for fundamental rights as provided by the EU Charter; guidance by the principle of subsidiarity in the application of individual investigative measures; and the exclusive competence of the EPPO to investigate and prosecute EU fraud.¹⁵⁰ Whereas the proposed regulation is applicable to the activities of the EPPO, national law is relevant for cases not covered by the regulation, in such a case, the law of Member State where the investigation or prosecution takes place will apply.¹⁵¹ In cases where both national law and the regulation are applicable, the latter takes precedence.

The central provisions concern the *competences* of the EPPO. The first competence is to investigate and prosecute ‘criminal offences affecting the financial interests of the Union.’¹⁵² The second one is an ancillary competence to pursue criminal offences ‘inextricably linked’ with EU fraud and ‘their joint investigation and prosecution are in the interest of a good administration of justice.’¹⁵³ For the EPPO to have an exclusive competence in these two cases, the offence has to be ‘wholly or partly committed’ either on the territory of one or several Member States, or by one of their nationals; Union staff members or members of the institutions.¹⁵⁴

Chapter III of the Commission proposal regulates in detail the rules of procedure on investigations, prosecution and trial proceedings. The core provisions concern the initiation of investigations: the EPP, or the EDP acting on its behalf, initiates the investigations concerning crimes against EU budget, which are later led by the EDP under the instructions of the EPP.¹⁵⁵ The EPP and the EDP have the same power as a national public prosecutor to prosecute and bring the case before a court.¹⁵⁶

¹⁴⁸ Art 10 of the proposal.

¹⁴⁹ Art 10(2) of the proposal

¹⁵⁰ Art 11 of the proposal.

¹⁵¹ Art 11(3) of the proposal.

¹⁵² Art 12 of the proposal.

¹⁵³ Art 13 of the proposal.

¹⁵⁴ Art 14 of the proposal.

¹⁵⁵ Art 16(1) and Art 18(1) of the proposal.

¹⁵⁶ Art 25 of the proposal.

The draft legislative act provides *procedural safeguards* for suspects and accused persons.¹⁵⁷ The rights of suspects and accused persons include those provided for by EU legislation, such as right to interpretation and translation or access to case materials and to a lawyer, as well as those granted in accordance with national law: the right to remain silent and the presumption of innocence; the right to legal aid; and the right to present evidence.

The proposal leaves the *judicial review* of the EPPO's acts of investigation and prosecution in the hands of national courts. This is so because under the draft regulation, the EPPO 'is considered as a national authority for the purpose of judicial review'.¹⁵⁸ In other words, the EPPO is not 'a body, office or agency of the Union', which means that the EU courts are not competent to adjudicate on the acts of the EPPO in the action of annulment (Article 263 TFEU), Treaty infringement proceedings (Article 265 TFEU) and actions for failure to act (Article 268 TFEU).¹⁵⁹ Hence, only national courts may review acts of investigation and prosecution on the part of the EPPO. In addition, national courts may direct a preliminary question to the Court of Justice according to Article 267 TFEU, including questions on the interpretation of the EPPO regulation.¹⁶⁰

Finally, because the EPPO is created 'from Eurojust,' the proposal underlines that the EPPO 'shall establish and maintain a special relationship with Eurojust based on close cooperation and the development of operational, administrative and management links between them.'¹⁶¹ These links include sharing information, such as, for example, personal data.¹⁶²

¹⁵⁷ See Chapter IV of the proposal.

¹⁵⁸ Art 36 of the proposal.

¹⁵⁹ Explanatory Memorandum at 7.

¹⁶⁰ Art 36(2) of the proposal. In fact, according to the analysis of the regulation by ECJ Judge Bay Larsen, the preliminary reference may also include, besides the interpretation of the EPPO regulation, also 'other elements of Secondary Union law, as well as Primary Union law, notably the Charter, national courts will have the possibility and sometimes the obligation to make a preliminary reference to the CJEU. This also implies that the CJEU in practice will have the power to rule on the compliance of national procedures and national laws with the obligations stemming from Union Law.' Bay Larsen explained also that EPPO remains a EU body and hence the Charter 'will be applicable to procedural measures such as carrying an investigation for which the EPPO is responsible, even if this is principally carried out by national authorities acting in a national legal setting on the EPPO's instruction. This may lead and sometimes oblige national courts to make preliminary references before the CJEU when the interpretation of the Charter raises doubts.' According to Judge Larsen, in such a situation the Akerberg Fransson jurisprudence on the scope of application and supremacy of the Charter would be applicable. See Council of the European Union, Conclusions of the conference organized by the Lithuanian Presidency in cooperation with the European Commission and the Academy of European Law (Vilnius, 16-17 September), 13863/1/13, 14.10.2013, at 20, 23-24.

¹⁶¹ Art 57(1) of the proposal.

¹⁶² Art 58(2) of the proposal.

2.3 The reasoned opinions of the national parliaments

Fourteen chambers of national Parliaments have issued reasoned opinions within the 8-week deadline. The reasoned opinions came from unicameral parliaments: the Cypriot House of Representatives, the Hungarian National Assembly, the Maltese House of Representatives, the Slovenian National Assembly, the Swedish Riksdag; both chambers of the Irish Oireachtas, the Dutch and the UK parliaments; and from chambers of bicameral parliaments, specifically the Czech and French Senates, and the Romanian Chamber of Deputies.¹⁶³ Whereas the necessary number of opinions to trigger a ‘yellow card’ is one quarter in the case of a draft legislative act submitted on the basis of Article 76 TFEU on the area of freedom, security and justice, in the case at hand, reasoned opinions represented 18 votes out of 56.¹⁶⁴

Despite the fact that some national parliaments welcomed the creation of the EPPO in their reasoned opinions¹⁶⁵ or considered that the EPPO would be able to be ‘assimilated’ in the national judicial system and that it contributed to the objective of the proposal,¹⁶⁶ the message from the reasoned opinions was negative: the proposal is ‘unnecessary, excessive and insufficiently justified.’¹⁶⁷ The main arguments of national parliaments concerning the competence of the EU to act, subsidiarity, proportionality and the merits of the proposal (especially the structure of the Office and fundamental rights protection) will be examined in turn.

Many national parliaments voiced their concerns regarding the lack of *competence* of the EU to act in the area at stake. Namely, national parliaments opined that penal legislation is a matter of national sovereignty;¹⁶⁸ in other words, criminal law is ‘primarily a national competence.’¹⁶⁹ In the view of the Hungarian parliament, the ‘supranational model’ of the Office limits the existing national sovereignty in the field of criminal law.¹⁷⁰ For example, Articles 11(4) and Article 14 of the proposal ‘exceed the authorization enshrined in Article 86 of the Treaty on the Functioning of the European Union, since the latter doesn’t provide

¹⁶³ It must be underlined that orange card could not be reached in this case as Art 86 TFEU demands special legislative procedure whereas the orange card operates only in the ordinary one.

¹⁶⁴ Protocol No. 2, Art 7(2).

¹⁶⁵ Maltese Parliament, Reasoned opinion of 28.10.2013 on COM(2013) 534, point 2.1.

¹⁶⁶ Romanian Chamber of Deputies, Reasoned opinion of 28.10.2013 on COM(2013) 534, point 3.

¹⁶⁷ UK House of Lords, Reasoned opinion of 24.10.2013 on COM(2013) 534, point 13.

¹⁶⁸ Maltese Parliament, Reasoned opinion of 28.10.2013 on COM(2013) 534, point 2.3.

¹⁶⁹ Irish House of Oireachtas, Reasoned opinion of 16.10.2013 on COM(2013) 534, point 5.

¹⁷⁰ Hungarian National Assembly, Reasoned opinion of 21.10.2013 on COM(2013) 534 (summary in English).

exclusive competence to the European Public Prosecutor's Office.¹⁷¹ The Romanian Chamber of Deputies argued rather that the extent of EPPO's competences goes beyond the objective of Article 86 TFEU: the notion of 'the Union's financial interest' does not allow for a clear line to be drawn between the offences that concern only the EU's budget and those of national systems, which, in consequence, leads to an overlap between the two jurisdictions and the impossibility to pursue the prosecution at national level.¹⁷² In the same vein, the Dutch chambers claimed that there is a possibility that the prosecution of national offences will be restrained, 'partly because it remains unclear how far the definition of "the financial interest of the Union" stretches.'¹⁷³ Finally, the Slovenian parliament suggested that the far-reaching exclusive competence of the EPPO runs counter to Slovenian constitutional law.

With regard to the subsidiarity principle, the reasoned opinions focused on its *procedural aspect*, in the sense that the Commission did not provide 'a detailed statement making it possible to appraise compliance with the principles of subsidiarity,' 'substantiated by qualitative and, wherever possible, quantitative criteria.'¹⁷⁴ Accordingly, the House of Commons argued that the draft legislative acts should incorporate a detailed statement on the subsidiarity and proportionality of a measure in the explanatory memorandum, which is available in all official languages of the EU, in contrast to an impact assessment, which usually contains only an executive summary in the Member State's official language.¹⁷⁵ In consequence, the House of Commons concluded that there had been a violation of the procedural requirement of Article 5 Protocol No. 2.¹⁷⁶ In the view of the House of Lords, options other than the EPPO, for example strengthening the powers of Eurojust, were not sufficiently examined by the Commission.¹⁷⁷ The Cypriot parliament argued that 'key parts of the proposal are based on assumptions or scenario approaches,' for example there is no full set of data assessing the performance of Member States' judicial systems, but the Commission still argued that EU action is indispensable.¹⁷⁸ In the view of national parliaments, the Commission did not prove that 'Member States take fraud against the

¹⁷¹ Ibid.

¹⁷² Romanian Chamber of Deputies, Reasoned opinion, point 9.

¹⁷³ Dutch Eerste Kamer, Reasoned opinion of 17.10.2013 and Tweede Kamer of 10.10.2013 on COM(2013) 534.

¹⁷⁴ Protocol No. 2, Art 5.

¹⁷⁵ The Impact Assessment for the EPPO was drafted in English, see: Commission Staff Working Document, Impact Assessment, Accompanying the Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, 17.7.2013, SWD(2013)274, whereas the Executive Summary was available in all EU official languages, 17.7.2013, SWD(2013)275.

¹⁷⁶ UK House of Commons, Reasoned opinion of 22.10.2014 on COM(2013) 534, point 10.

¹⁷⁷ Ibid point 14; UK House of Lords, Reasoned opinion, point 14.

¹⁷⁸ Cyprus House of Representatives, Reasoned opinion of 23.10.2013 on COM(2013) 534, p.3.

financial interests of the EU any less serious than fraud committed against anyone else.’¹⁷⁹ The Impact Assessment ‘lacks a solid basis’ in arguing that Member States’ actions are not sufficient.¹⁸⁰

Turning now to *subsidiarity* tests, in the view of national parliaments, the proposal did not fulfil the ‘national insufficiency test.’ The Slovenian parliament stated that the national authorities in that Member State were successful in the investigation and prosecution of offences affecting the EU’s financial interests, and that improvements should rather be sought in the cooperation between the competent national authorities and the already existing EU bodies. The House of Lords concluded that the Commission’s ‘assessment of the improved rates of prosecution and recovery to be gained by the establishment of the EPPO’ is too optimistic and that Member States are in a position to fight EU fraud by means of national criminal law.¹⁸¹ Likewise, Sweden stated that the Commission did not show that the national level measures together with Eurojust could not better achieve the objectives of the proposal.¹⁸² The idea of improving existing mechanisms, the Eurojust and OLAF,¹⁸³ and their cooperation with Member States, was also echoed in the opinions of other parliaments.¹⁸⁴

Moreover, in the view of national parliaments, the Commission did not fulfil the second dimension of the subsidiarity principle, namely the ‘comparative efficiency test.’ For example, the Czech Senate argued that insufficiencies in the prosecution of criminal offences against the financial interests of the Union at national level are caused by ‘different laws and also generally by the functioning of their judicial and administrative systems’ and ‘general difficulties with uncovering various types of financial criminality.’¹⁸⁵ In the view of the Czech parliament, the EPPO proposal does not solve these problems. The objectives of the proposal, thus, can not be better achieved at EU level.

National parliaments also highlighted the violation of the *proportionality* principle, stating that the proposal goes beyond what is necessary in order to achieve the objectives of the Treaties. For instance, the Cypriot parliament argued that the restriction of the national competence for the investigation and prosecution of PIF (‘protection of financial interests’)

¹⁷⁹ Irish House of Oireachtas, Reasoned opinion, point 5 c.

¹⁸⁰ Dutch Eerste Kamer and Tweede Kamer, Reasoned opinions.

¹⁸¹ UK House of Lords, Reasoned opinion, point 17.

¹⁸² Swedish Riksdag, Reasoned opinion of 25.10.2013 on COM(2013) 534; Slovenian National Assembly, Reasoned opinion of 25.10.2013 on COM(2013) 534.

¹⁸³ Dutch Eerste Kamer and Tweede Kamer, Reasoned opinions; UK House of Lords, Reasoned opinion, point 18.

¹⁸⁴ Irish House of Oireachtas, Reasoned opinion, point 5b-c.

¹⁸⁵ Czech Senate, Reasoned opinion of 9.10.2013 on COM(2013) 534, point II 1.

offences, by allowing the EPPO an exclusive competence in this regard, goes beyond what is necessary to achieve EU objectives.¹⁸⁶ One of the specific examples given by the Cypriot parliament is Article 13 of the proposal on the ancillary competence, extending the EU competence at the cost of national level action. Similarly, the Maltese parliament underlined that the way in which the competences of the EPPO are drafted is ‘not necessarily the least intrusive and not the best way of achieving the reasonable stated objectives.’¹⁸⁷ Similarly, the Swedish Riksdag concluded that ‘the proposal is so far-reaching that the question must be put as to whether the proposed measures exceed what is necessary to achieve its objective,’ which constitutes a violation of ‘the proportionality criterion that is included in the subsidiarity check.’¹⁸⁸

Regarding the *merits* of the Commission proposal, national parliaments addressed two main issues; the structure of the EPPO and the protection of fundamental rights. Regarding the former, the French and Romanian chambers maintained that the EPPO should have a collegial character (a chosen president with a rotation), which would anchor the EPPO better in the national systems.¹⁸⁹ Concerning fundamental rights protection, some legislative chambers argued that the proposal does not provide for the necessary level of protection of rights, offering standards that are lower when compared to the national level. Such an issue was raised for example with regard to the rights of suspects, since not all investigative measures listed in the Commission’s proposal are foreseen under national law.¹⁹⁰ In the same vein, the House of Commons argued that the Commission’s proposal does not provide for a high enough level of protection of suspects’ rights: for example, ‘the lack of detail on arrangements for judicial review undermines the proposal’s compliance with the Rule of Law.’¹⁹¹ Moreover, the reasoned opinion of the Czech Senate highlighted a possible violation of a number of fundamental rights: ‘the right to a lawful judge, which may be touched upon by the broad discretion of the European prosecutor in the choice of the competent national court, and the right to fair trial, which may be touched upon by the single-instance decision-making of the Office, the absence of appellate procedures against decisions regulated in detail in the proposal, as well as absence of any procedure for adjudication on the objection

¹⁸⁶ Cyprus House of Representatives, Reasoned opinion at 4.

¹⁸⁷ Maltese Parliament, Reasoned opinion, point 2.2.

¹⁸⁸ Swedish Riksdag, Reasoned opinion.

¹⁸⁹ French Sénat, Reasoned opinion of 28.10.2013 on COM(2013) 534; Romanian Chamber of Deputies, Reasoned opinion, point 10; Maltese Parliament, Reasoned opinion, point 2.3.

¹⁹⁰ Cyprus House of Representatives, Reasoned opinion at 4.

¹⁹¹ UK House of Commons, Reasoned opinion, point 17.

of prejudice of the European prosecutor, with the exception of judicial review.¹⁹² The infringement of these rights protected under the Czech constitution and under the ECHR may in consequence compromise the fundamental rights protection under the EU Fundamental Rights Charter.

In addition, some parliaments issued opinions within the political dialogue ('Barroso initiative'). Many of them, like the Italian Senato, claimed compatibility with the subsidiarity principle due to the efficacy of the proposal, which cannot be achieved by single Member States;¹⁹³ similarly the Portuguese parliament underlined the 'intrinsic European dimension of the EPPO'.¹⁹⁴ The Romanian Senate's opinion did not perceive a subsidiarity violation, except for the provision concerning the delegated prosecutors automatically becoming national prosecutors, as this would interfere with the judicial organization of the state.¹⁹⁵

Other parliaments, acting within the 'Barroso initiative' commented rather on the contents of the proposal. The French Assemblée Nationale and the Croatian parliament issued opinions which generally support the creation of the EPPO, yet with necessary changes to the structure, proposing an office 'composed of national members embedded in their respective judicial systems and electing among themselves a president, and not under a single European public prosecutor assisted by deputies and delegates to whom he would send his instructions'.¹⁹⁶ In the same vein, the Polish Senat backed the proposal, though appending a criticism concerning the exclusive competence of the EPPO in financial crimes and its ancillary competence.¹⁹⁷ The German Bundestag also welcomed the proposal, especially after the draft has been discussed in the Council, however pointing out some necessary changes.¹⁹⁸ The Grand Committee of the Finnish Eduskunta, similarly to the Spanish Parliament,¹⁹⁹ stated in its opinion that the EPPO proposal does not violate subsidiarity, however, the ancillary competence creates problems from the perspective of the Finnish Constitution

¹⁹² Czech Senate, Reasoned opinion, point II 6.

¹⁹³ Italian Senato, Risoluzione della 2a Commissione Permanente of 19.11.2013 on COM(2013) 534, specifically point 2 of the opinion of the 14th Permanent Commission on EU affairs. See also Commission reply to the Senato of 14.03.2014, C(2014)1527.

¹⁹⁴ Portuguese parliament, Opinion of the European Affairs Committee of 22.10.2013 on COM(2013) 534, point 12(b).

¹⁹⁵ Romanian Senate, Opinion of 28.10.2013 on COM(2013) 534.

¹⁹⁶ French National Assembly, European Resolution of 31.01.2014 (courtesy translation) on COM(2013) 534, point 7. Croatian parliament, Opinion of 1.04.2014 on COM(2013) 534.

¹⁹⁷ Polish Senat, Opinion of 9.10.2013 on COM(2013) 534 (courtesy translation). See also the Commission reply to the Polish Senat of 13.3.2014, C(2014)1599.

¹⁹⁸ German Bundestag, Opinion of 5.06.2014 on COM(2013) 534.

¹⁹⁹ Spanish parliament, Resolution of the Joint Committee for EU affairs of 15.10.2014 on COM(2013) 534.

(provisions on sovereignty and the public prosecution service).²⁰⁰ The German Bundesrat issued an opinion that was generally supportive of the proposal, positioning itself against a possible enhanced cooperation. The Bundesrat proposed *inter alia* that the exclusive competence of the EPPO in the investigation of the PIF crimes is returned to national authorities depending on factors such as the amount of damage; circumstance where only one Member State is concerned, or adequate enforcement by national authorities.²⁰¹

On the margin, it can be noted that the Commission proposal has been also assessed for its compatibility with the principle of subsidiarity by academics. Mitsilegas and Ligeti gave evidence to the House of Lords Select Committee on the European Union. Mitsilegas argued that the question at stake is not a sovereignty question on competence, as this is explicitly provided in the treaty, but rather one about who can best protect the EU budget.²⁰² Ligeti stated that ‘there was substantial evidence showing that national authorities in the past were not the best protectors of the European Union’s budget’ and hence ‘it is fair to argue that that can be done best at EU level.’²⁰³

2.4 Outcome

In the letters addressed to national parliaments, the Commission confirmed that the ‘yellow card’ had been triggered.²⁰⁴ Shortly afterwards, on 27 November 2013, the Commission communicated to national parliaments its decision to maintain the EPPO proposal. In the view of the Commission, the proposal complied with the principle of subsidiarity; hence there was no need to withdraw or amend it.²⁰⁵ The Commission, while examining the reasoned opinions, decided to distinguish between ‘arguments relating to the principle of subsidiarity, or that could be interpreted as subsidiarity concerns, and other arguments relating to the principle of proportionality, to policy choices unrelated to subsidiarity, or to other policy or legal issues.’²⁰⁶ As arguments on subsidiarity, the Commission qualified: those that concern the sufficient substantiation of the compatibility with the subsidiarity

²⁰⁰ Finnish Eduskunta, Statement of the Grand Committee 1/2013 of 13.12.2013 on COM(2013) 534.

²⁰¹ German Bundesrat, Resolution of 11.10.2013 on COM(2013) 534, point 6.

²⁰² House of Lords, Unrevised transcript of evidence taken before the Select Committee on the European Union, Justice, Institutions and Consumer Protection (Sub-Committee E), Inquiry into the Establishment of a European Public Prosecutor’s Office (EPPO), Evidence Session No. 1, 24.03.2014 at 9.

²⁰³ Ibid at 11.

²⁰⁴ See for example the letter from the Commission to the Romanian parliament of 12.11.2013, ARES (2013) 3702525.

²⁰⁵ Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No. 2, 27.11.2013, COM(2013) 851.

²⁰⁶ Ibid at 5.

principle; the alleged sufficient character of existing mechanisms; the added value of the proposal; issues relating to the structure of the EPPO; and issues relating to the nature and scope of its competences.²⁰⁷ The Commission rebutted the arguments assessing the proposal as ‘too far reaching,’ stating that the regulation ‘goes beyond what is necessary to achieve its objective;’ alleged fundamental rights violations and the lost capacity of Member States to prioritize activities of their own criminal justice systems.

The arguments of the Commission, which show that there is no subsidiarity violation, are the following. With regard to *procedural* subsidiarity, the Commission argued that the explanatory memorandum and the accompanying legislative financial statement, together with the more detailed impact assessment make the proposal ‘sufficiently substantiated with regard to the principle of subsidiarity.’²⁰⁸

Concerning the ‘national insufficiency test,’ the Commission maintained, basing its assessment on OLAF’s annual statistics that the ‘[sufficient] situation in particular Member States is therefore not decisive in itself, as long as it can be shown that action at the level of Member States is generally insufficient, and that Union action would generally better achieve the policy objective.’²⁰⁹ In addition, the Commission, referring to the arguments proposing the strengthening of OLAF, Eurojust and Europol instead of introducing the EPPO, argued that ‘none of the existing mechanisms or bodies at Union level can address the shortcomings identified in view of their limited powers.’²¹⁰ Likewise, the proposed PIF directive,²¹¹ which harmonises definitions of offences and sanction levels with regard to crimes against the Union’s financial interests, has no impact on the compatibility of the EPPO proposal with subsidiarity. In sum, the Commission restated that Member States cannot sufficiently achieve the objective of the EPPO regulation.

With regard the ‘EU’s comparative efficiency test,’ labelled as the ‘added value’ of the proposal, the Commission underlined that the common Union-level prosecution will compensate for the differences between Member States on investigation and prosecution of Union fraud, in addition preventing forum shopping by perpetrators.²¹² Moreover, the likelihood of discovering cross-border links in EU fraud crimes will increase in comparison to exclusively national level investigations. Other ‘added-value’ elements concern the

²⁰⁷ Ibid.

²⁰⁸ Ibid, point 2.2.

²⁰⁹ Ibid, point 2.3.

²¹⁰ Ibid.

²¹¹ COM(2012) 363.

²¹² Ibid, point 2.4.

simplification of procedures in obtaining information and evidence; the unconstrained admission of evidence lawfully collected in other Member States except for situations affecting fairness of the procedure and defence rights; and the merging of expertise on EU fraud. Taking into account these grounds, the Commission stated that the proposal fulfils the ‘comparative efficiency test.’

Next, still within the subsidiarity test, the Commission elaborated on the concerns of national parliaments with regard to the structure of the EPPO and its competences. With regard to the former, the Commission stated that the arguments more concern the proportionality principle than subsidiarity. Specifically, the choice of a decentralized model and the collegial structure favoured by national parliaments is not a question of preference of action at national over EU level, but ‘a comparison between two possible modes of action at the Union level’ and hence does not concern subsidiarity.²¹³ In the view of the Commission, the EPPO’s structure is however pertinent to the subsidiarity principle with regard to the comparative efficiency of EU level action. Indeed, a collegial structure would ‘hamper [the EPPO’s] efficiency, rendering its decision-making less efficient.’ Nonetheless, the Commission proposal allows for a ‘quasi-collegial’ approval in some cases because of their ‘operational importance,’ without diminishing the EPPO’s efficiency.

With regard to the arguments concerning the competence of the EPPO, the Commission focused its reply on the situation when the EPPO is competent to deal with all cases of fraud, including the non-cross-border cases and on the ancillary competence allowing the EPPO to intervene in criminal offences inextricably linked with those affecting the EU’s financial interests. On the former issue, the Commission argued that taking into account not only cross-border cases will guarantee ‘consistent investigation and prosecution policy across the Union and avoid parallel action at Union and national level, which would lead to duplication and a waste of precious resources.’²¹⁴ Regarding the ancillary competence of the EPPO, the Commission underlined that the principle of subsidiarity is not violated, because it allows for an efficient engagement in anti-fraud activities and does not violate the *ne bis in idem* principle.

While some MPs might see the possibility for the Commission to assess whether the threshold has been met as allowing the Commission to judge its own decision,²¹⁵ the division

²¹³ Ibid, point 2.5.

²¹⁴ Ibid, point 2.6.

²¹⁵ House of Commons Hansard Debates for 10 Feb 2014, Debate on COM(2013)821, Column 673.

of arguments of the Commission should be welcomed, as an attempt to re-establish a ‘healthy limit’ on the capacity of national parliaments to criticize EU legislative proposals.²¹⁶ It also follows the view promoted in this thesis that subsidiarity review should be a narrowly tailored mechanism. Perhaps the criticism of national parliaments concerning the structure of the EPPO should be seen more as an argument on the merits.

The reply of the Commission was negatively assessed in the parliamentary chambers, both because the Commission decided to keep the proposal, but also because of the content of Commission’s reply. For example in the evidence session of the House of Lords with Commissioner Maroš Šefčovič, the House criticised the very prompt reply of the Commission, which failed to study the reasoned opinions, the exclusion of non-subsidiarity arguments and the Commission’s persistence in maintaining the proposal.²¹⁷ In the House of Commons, the Chairman of the European Scrutiny Committee reacted to the plan of the Commission to go further with the proposal presented condemning it as ‘complete contempt for our Parliament and the others.’²¹⁸ The Croatian parliament which did not issue a reasoned opinion itself maintained that the Commission reply of 27 November 2013 was unsatisfactory – it did not give concrete explanations for the rejection of the arguments of national parliaments.²¹⁹ The Finnish parliament, which issued an opinion during the political dialogue, used it as an opportunity to express its discontent about the functioning of the EWS in general.²²⁰ It stated that the EWS ‘is a singularly ineffective way to affect European legislation,’ the Commission replies come delayed and do not respond to the substantive arguments of national parliaments. The parliament also maintained that the reasoned opinions have no impact on legislative outcomes, except for cases where the views of parliaments are supported by those of national governments in the Council. More positive was the Romanian chamber, which, in its opinion within the political dialogue issued after the Commission reply, recognised ‘in principle the validity of the European Commission's arguments for maintaining the proposal’ while making some additional observations.²²¹

²¹⁶ Federico Fabbrini, ‘The Principle of Subsidiarity’ in Takis Tridimas and Robert Schütze (eds), *Oxford Principles of EU Law* (OUP 2014 forthcoming).

²¹⁷ House of Lords, European Union Select Committee, The Role of National Parliaments in the European Union. Oral and Written evidence, Q89-99, 07.01.2014.

²¹⁸ See Cash in House of Commons Hansard Debates for 10 Feb 2014, Column 673.

²¹⁹ Croatian parliament, Opinion of 1.04.2014 on COM(2013) 534.

²²⁰ Finish Eduskunta, Statement of the Grand Committee 1/2013. See also the Commission reply to the Eduskunta of 19.03.2014.

²²¹ Romanian Chamber of Deputies, Opinion of 27.12.2013, p.7.

In March 2014, the Commission sent individual replies to each of the parliaments, which are presented in the annexed table.

2.5 The current state of play

Since the introduction of the draft proposal, it has been discussed at a number of the Council meetings due to its perceived importance and impact on EU criminal justice.²²² The first revision of the text took place in March 2014, with a view to reflecting these discussions as well as ‘tak[ing] account’ of the views expressed by national parliaments in their reasoned opinions.²²³ The revised draft specifically focuses on the structure and competence of the EPPO. Regarding the structure of the EPPO, a model based on a college from all participating Member States has been approved.²²⁴ With regard to the exclusive competence of the EPPO, it was proposed by the Greek Presidency that it be exchanged for a concurrent competence.²²⁵ This means that both the EPPO and national prosecution authorities are competent to investigate and prosecute crimes against the EU budget, yet if the EPPO decides to exercise its competence, national authorities may not exercise theirs. At the same time, the EP, whose consent is necessary for the establishment of the EPPO under Article 86(1) TFEU, debated²²⁶ and approved the resolution on the EPPO.²²⁷ While giving a positive assessment of the proposal as reinforcing the fight against EU fraud, the EP called upon the Council to involve it more in its legislative work (via a better flow of information and continuous consultations with the EP).²²⁸

2.6 Comparison with the first ‘yellow card’

As mentioned earlier, the EPPO was not the first proposal to receive a ‘yellow card’ from national parliaments. On 6 June 2012, the Commission acknowledged that enough votes (19 out of 54) had been cast by national parliaments, and the first ‘yellow card’ was triggered with regard to the Monti II proposal, which aimed at balancing fundamental freedoms with

²²² Council of the European Union, 13567/13, 12.09.2013, p.1. Throughout the year the delegations received set of questions on specific provisions of the proposal. See for example Council of the European Union, 15386/13, Discussion paper, 29.10.2013

²²³ Council of the European Union, 8999/14, 15.04.2014.

²²⁴ Ibid, some specifications added in May 2014. Council of the European Union, 9834/1/14, 21.05.2014.

²²⁵ Details to be found in Council of the European Union, 9834/1/14, p. 3.

²²⁶ EP debate, CRE 11/03/2014-15. Only one of the MEPs (Anna Maria Corazza Bildt, PPE) called upon the Commission not to ignore the ‘yellow card’ raised by national parliaments.

²²⁷ European Parliament resolution of 12 March 2014 on the proposal for a Council regulation on the establishment of the European Public Prosecutor’s Office, P7_TA(2014)0234.

²²⁸ Resolution points 2 and 3.

the right to strike.²²⁹ The Commission, following Protocol No. 2, announced its intent to review the proposal. On 12 September 2012, in contrast to the EPPO proposal, the Commission communicated the withdrawal of the proposal for a regulation on the exercise of the right to strike.²³⁰ Interestingly, in a letter to national parliaments, the Commission stated that it still considered the proposal as compatible with the principle of subsidiarity. By assessing the arguments put forward by national parliaments in their reasoned opinions, which concerned ‘the added value of the draft Regulation, the choice of the legal basis, the EU competence to legislate on this matter, the implications of the general principle included in Article 2 of the draft Regulation and the reference to the principle of proportionality in Article 3(4) and in recital 13 of the draft Regulation, equal access to dispute resolution mechanisms and the alert mechanism,’ the Commission ‘has not found based on this assessment that the principle of subsidiarity has been breached.’²³¹ In consequence, the reason for the withdrawal was that the ‘proposal is unlikely to gather the necessary political support within the European Parliament and Council to enable its adoption.’²³²

However, the decision to withdraw the Monti II proposal could have had a negative effect on the institutional balance in the EU. Despite the justification that the withdrawal was caused by the likely lack of appropriate majorities in the Council and the EP in the future, some national parliaments quickly reacted to the Commission’s decision arguing that, in fact, *their* reasoned opinions were the cause of the Commission’s action. For example, the French Sénat in its press release stated that the ‘parliamentary control shows its effectiveness at EU level’ and highlighted the pioneering role played by the chamber in mobilizing national parliaments.²³³ The reaction of the Latvian Saeima was even bolder: ‘Saeima makes the EU withdraw its proposed regulation.’²³⁴ The decision to withdraw the proposal could have unintentionally encouraged national parliaments use the EWS to assess aspects that go beyond the control of the subsidiarity principle. Since this chapter has suggested that a broad review applied by the national parliaments is not compatible with the function assigned to

²²⁹ See as an example the letter of 6.6.2012 from the Commission to the Belgian parliament, available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc53782a3ff0137daf67d262db3.do>.

²³⁰ See the letter by President Barroso to the President of the European Parliament, Mr Martin Schulz, Memo 12/661, 12 September 2012.

²³¹ Letter of 12.09.2012 from the Commission to the House of Commons, Ares(2012)1058907. The reply is available in all languages at: http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/letter_to_nal_parl_en.htm.

²³² Ibid.

²³³ Press release of the French Sénat (13 Sept. 2012), available at <www.senat.fr/presse/cp20120913.html> (own translation).

²³⁴ Press release of the Latvian Saeima (18 Sept. 2012), available at <www.saeima.lv/en/news/saeima-news/20026-saeima-makes-eu-withdraw-its-proposed-regulation>.

them by the Lisbon Treaty, it seemed that the Commission has taken a strategically wrong decision.

In fact, national parliaments in the reasoned opinions to the EPPO proposal again voiced concerns on the competence, proportionality and merits of the proposal, but this time clearly also assessed subsidiarity. In both cases, the Commission did not acknowledge a subsidiarity breach, but only in the EPPO case did it decide to continue the legislative process. Why was that?

In both cases, unanimity in the Council was a prerequisite for the proposal to become binding law. The legal basis of the Monti II proposal, namely Article 352 TFEU, demands that '[i]f action by the [EU] should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the [EU] Parliament, shall adopt the appropriate measures.' In the same vein, Article 86 TFEU, the legal basis for the EPPO proposal requests that '[t]he Council shall act unanimously after obtaining the consent of the European Parliament.'

There seem to be two explanations of the inconsistency of the Commission's approach concerning the Monti II and the EPPO proposal 'yellow cards,' which also shed light on the Commission's future reactions to the 'yellow card' procedure. The first reason is connected with how important the proposal is on Commission's agenda. Second, if other ways of pursuing the objective exist, for example, enhanced cooperation, the Commission will be willing to stay firm on its position and move forward with its 'plan B' in case the proposal fails to achieve the necessary support with the EU legislator.²³⁵

Regarding the first explanation; the EPPO proposal has enjoyed support within the Commission since the beginning.²³⁶ However, this does not seem to be the case with the 'right to strike' proposal. Not only was the text of the regulation very brief and ambiguous,²³⁷ but the EP debate also seems to show that the idea of the proposal stems from the criticism of the EP socialists. The debate on the Statement by the President-designate of the Commission in September 2009 appears to show that even though Barroso confirmed that the right to strike and the right of association are 'sacred rights,' he added '[a]t the same time, we are

²³⁵ See also on this point C. Fasone, *Parliamenti nazionali e controllo di sussidiarietà: il secondo 'cartellino giallo' sull'istituzione della Procura europea*, 33 *Quaderni Costituzionali* 2014, 165-167, at 166.

²³⁶ See the 2001 Green Paper, COM(2001) 715 final.

²³⁷ See Chapter 6.

committed to the freedom of circulation in Europe.’ Concluding this point, Barroso referred to the ideas of the Socialist Group with regard to the respect of fundamental rights of workers:

‘[t]hat is why I proposed here a way forward inspired by many of your suggestions and I am ready to work in loyalty with all the Members of this Parliament to achieve it so that we have a stronger Europe, keeping our internal market, but respecting fully the social rights of our workers.’²³⁸

The position of the President-designate of the Commission underlines that the idea of safeguarding the right to strike was demanded by the Socialist Group and from the beginning it was visible that the Commission would not accord it absolute priority, but had to provide a compromise solution. As Barrett points out, the Commission seemed to stick to the group of several Member States which welcomed the ECJ rulings in the Viking and Laval cases, but ‘nonetheless attempted to soothe feelings on all sides’ with its Monti II regulation.²³⁹ The ‘yellow card’ ‘provided an occasion’ for the Commission to abandon its proposal.²⁴⁰

Second, whereas lack of unanimity in the Council or lack of the EP’s consent was a clear threat to the future of the Monti II proposal after the ‘yellow card’ triggered by national parliaments, Article 86(1) TFEU allow such proposals to be re-started in the form of enhanced cooperation; the ‘emergency accelerator’ can be started.²⁴¹ Accordingly, if the regulation on the EPPO does not find unanimity in the Council, a group of nine Member States may request that the proposal is referred to the European Council, while the procedure in the Council is suspended. If within four months, Member States will agree to the proposal, it is referred back to the Council for adoption. If, however, within these four months, Member States did not reach an agreement, nine Member States may establish enhanced cooperation on the basis of the EPPO proposal;²⁴² only a notification to the European Parliament, the Council and the Commission is necessary; authorisation to proceed with enhanced

²³⁸ EP debate of 15.09.2009, Statement by the President-designate of the Commission, point 11. See also the promise of Barroso ‘to propos[e], as soon as possible, a regulation to resolve the problems that have arisen. This regulation will be codecided by the European Parliament and the Council. A regulation has the advantage of giving much more legal certainty than the revision of the directive itself, which would still leave too much room for diverging national transpositions and take longer to produce real effects on the ground. But, if we discover during the preparation of the regulation that there are areas where we need to revisit the directive itself, I will not hesitate to do so. Let me be clear – I am committed to fighting social dumping in Europe whatever form it takes.’

²³⁹ Barrett, ‘Monti II. The Subsidiarity Review Process Comes of Age... Or Then Again Maybe It Doesn’t’, 597.

²⁴⁰ Ibid at 599. See also Schima at 385.

²⁴¹ Craig, *The Lisbon Treaty: law, politics, and treaty reform* at 370.

²⁴² This number of Member States is also applicable to the ‘standard’ enhanced cooperation, as provided by Art 20(2) TFEU.

cooperation ‘shall be deemed to be granted and the provisions on enhanced cooperation shall apply.’ In contrast, enhanced cooperation under Article 20(2) TEU and Article 329(1) TFEU demands an authorisation to proceed with enhanced cooperation ‘granted by the Council, on a proposal from the Commission and after obtaining the consent of the European Parliament.’ The difference between the ‘general scheme’ of enhanced cooperation and ‘particular rules’ such as in Article 86(1) TFEU reflects the ‘sensitivity of the subject matter.’²⁴³ In fact, the ‘particular rules’ of enhanced cooperation apply only vis-à-vis provisions on judicial cooperation in criminal matters and police cooperation.

It follows from the above that it is very likely that the Commission will continue its efforts to introduce the EPPO on the basis of the existing text of the proposal, and this is why the proposal remained intact.²⁴⁴ The perspective of enhanced cooperation seems compelling; yet, there are also difficulties inherent in this structure such as the limitation of the territorial powers of the EPPO to Member States participating in the cooperation; further, the EPPO provisions will need to regulate the relationship between the participating and non-participating Member States.²⁴⁵ Moreover it is uncertain which Member States would be interested in enhanced cooperation, though Belgium, Luxembourg, the Netherlands and Spain ‘have expressed interest recently,’ which makes enhanced cooperation ‘the most likely.’²⁴⁶ Similarly, Klip states that ‘[g]iven the current political situation, it is most likely that the EPPO would initially commence operations only for a limited number of Member States.’²⁴⁷ In any case it would be impossible to include all the Member States in the EPPO project, because of the UK and Danish opt-outs.²⁴⁸

²⁴³ Paul Craig, *The Lisbon Treaty: law, politics, and treaty reform* (Oxford University Press 2013), at 444.

²⁴⁴ So far, there does not seem to be any Commission proposal on the enhanced cooperation in this regard. Cf. Council of the European Union, 5482/14, 20.01.2014, p.3.

²⁴⁵ Hamran and Szabova at 49.

²⁴⁶ Simone White, ‘Towards a Decentralised European Public Prosecutor’s Office?’ (2013) 4 *New Journal of European Criminal Law* (NJECL) 22 at 37.

²⁴⁷ André Klip, *European criminal law: an integrative approach* (Intersentia 2012) at 463.

²⁴⁸ See Art 1 of Protocol No. 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice; Art 1 of Protocol No. 22 on the position of Denmark. The UK, Ireland and Denmark may however, in accordance with Article 3 of the appropriate protocols within three months after the proposal has been presented to the Council notify its President that they wish to take part in the adoption and application of the proposal. In the UK, the government and the parliament agreed that ‘the UK should not opt in to the draft Regulation on the Eurojust at this time and should conduct a thorough review of the final agreed text to inform active consideration of opting into the Eurojust Regulation, post adoption, in consultation with Parliament; and further agreed with the Government that the UK should not participate in the establishment of any European Public Prosecutor’s Office.’ Cf. House of Commons, Hansard Debates for 29.10.2013, Column 892. Within three months after the proposal had been presented to the Council the UK and Ireland have not given their notice to take part in the adoption of the EPPO regulation, hence they will not participate in its adoption and their votes will not be counted towards the unanimity requirement (Art 238(4) TFEU provides that

Would the launch of the EPPO in the form of enhanced cooperation, however, be less justifiable from the perspective of the subsidiarity principle? Indeed, it has been argued by the Commission that an action at the EU level, covering all the Member States is necessary due to the cross-border character of EU fraud crimes.²⁴⁹ Starting an enhanced cooperation of a limited number of Member States seems to go against the need for the action at EU level. Yet, it could be argued that it is a legitimate expectation that with time other Member States will start joining the initiative. Moreover, the regulation implementing the enhanced cooperation on the EPPO will have to pass the subsidiarity test. Article 3 of Protocol No. 2 includes in the notion of ‘draft legislative acts’ not only proposals from the Commission, but also, among others, initiatives from a group of Member States.²⁵⁰

The comparison between the two ‘yellow cards’ highlights that the willingness of the Commission to move on with a proposal depends on two issues, notwithstanding the possible majorities that the proposal needs to gain within the EU legislative process. First, it is the importance of the draft act for the Commission’s agenda. Second, it is the possibility to re-launch it in another form, such as enhanced cooperation, in case of defeat before the Council or the EP.

Conclusion

In sum, Paul Craig’s concerns about the role of national parliaments in the subsidiarity scrutiny seem to be confirmed only partially. National parliaments participate in the subsidiarity review, and two ‘yellow cards’ have been triggered thus far, but the focus of reasoned opinions is often far from subsidiarity issues.

Assigning only a limited role to national parliaments by focusing their review on subsidiarity only has been criticised from the start as ‘virtually unenforceable, and depend[ing] for its

abstentions are not an obstacle to unanimity.) Council of the European Union, 6267/14, 7.02.2014, point 6 and 10.

²⁴⁹ COM(2013) 534, Explanatory Memorandum at 2.

²⁵⁰ As a comparable example see the Proposal for a Council Directive implementing enhanced cooperation in the area of financial transaction tax, 14.2.2013, COM(2013) 71, in which case the lettre de saisine (SG-Greffe(2013) D/1947, 19.2.2013) clearly stated that the EWS applies and the reasoned opinion of the Swedish Riksdag of 11.04.2013 on COM(2013) 71. In the case of the EPPO an authorisation of the Council on the proposal of the Commission and after obtaining the consent of the EP is not necessary to proceed with the enhanced cooperation, according to Art 329(1) TFEU and as provided by Art 86(1) subparagraph 3 TFEU such an authorisation is deemed as granted. Hence in this case national parliaments will not assess the Commission proposal for a Council Decision *authorising* enhanced cooperation, as exemplified in the case of Proposal for a Council Decision authorising enhanced cooperation in the area of the creation of unitary patent protection COM(2010) 790 and the political dialogue opinion of the Italian Senato.

effectiveness on the restraint of the national parliaments.²⁵¹ More recently, after the EWS came into force, this version of narrowly tailored subsidiarity has been criticised as ‘rather idealistic,’²⁵² and as a missed opportunity ‘to politicise the dialogue between the Commission and national parliaments.’²⁵³ It has been argued that subsidiarity is more significant as a political principle, and national parliaments, which are political institutions, should be granted a possibility to interpret subsidiarity in a way that they find appropriate.²⁵⁴ Goldoni proposes the ‘political interpretation of the subsidiarity review’ of the EWS as a ‘commitment to enhance representative democracy’ in line with Article 10 TEU and giving national parliaments a role similar to that of constitutional courts, namely as ‘protectors of constitutional essentials’ in accordance with Article 4(2) TEU. In his view, reducing subsidiarity to a ‘technical exercise of competence review (...) betrays, by institutional design, a pro-European centripetal prejudice.’²⁵⁵ In Goldoni’s view, the EWS is ‘an invitation to national parliaments and to their EACs in particular, to investigate, judge, influence and censure the legislative proposals of the Commission.’²⁵⁶

The argument that ‘more parliamentary involvement brings more democratic legitimacy’ seems to be *prima facie* morally plausible. Yet, in normative terms, there is a set of arguments speaking against a broad subsidiarity review. First, the aforementioned textual, structural and functional arguments explain ‘why not.’ In addition, the practice shows that in the case of the first ‘yellow card,’ the withdrawal of the proposal where the Commission did not find convincing subsidiarity arguments caused a misunderstanding within the national parliaments about their role in the EU legislative process. This was also confirmed, by the major discontent of some national parliaments to the fact that the Commission did not withdraw the EPPO proposal. Although Protocol No. 2 provides that the Commission may withdraw its proposal in the case of a ‘yellow card,’ this could reasonably be expected in a case where the Commission itself is persuaded by the subsidiarity arguments expressed in a reasoned opinion. The outcome of the first ‘yellow card’ was hence closer to a ‘red card’ and in the second ‘yellow card,’ national parliaments expected a ‘red card’ effect again.

²⁵¹ Barber, ‘Subsidiarity in the Draft Constitution’ at 203.

²⁵² Wojciech Gagatsek, ‘Polityczne i prawne znaczenie zasady pomocniczości w UE (po 20 latach od wejścia w życie Traktatu z Maastricht)’ [2013] Europejski Przegląd Sądowy 31, 38.

²⁵³ Marco Goldoni, ‘The Early Warning System and the Monti II Regulation: The Case for a Political Interpretation’ (2014) 10 European Constitutional Law Review 90, 101.

²⁵⁴ Gagatsek at 38.

²⁵⁵ Goldoni at 102.

²⁵⁶ Ibid at 106.

As argued by Convention Working Group I, which set the principles of the subsidiarity scrutiny, ‘these improvements should not make decision-making within the institutions more cumbersome or lengthier, nor block it.’²⁵⁷ The possibility to allow a ‘red card’ procedure would have been ‘an enormous concession to the supposed wisdom of national Parliaments at the expense of efficient problem solving initiated by the Commission and carried forward by the Council and European Parliament.’²⁵⁸

Another question concerns the subsidiarity scrutiny where there are not enough opinions for a ‘yellow card.’ Why not allow a broad review? First, it would mean marrying the role already played by the ‘Barroso initiative,’ which has also had some effect on EU policy-making as was shown in the previous chapter. Second, the amount of the opinions sent within the political dialogue outnumbers those within the EWS. Hence, it means that allowing broadly drafted reasoned opinions would also have probably increased their total number. For the Commission, to go through these within a reasonable time and highlight subsidiarity arguments would have involved certain concessions concerning the speed and efficiency of the legislative procedure. Currently, some national parliaments draft broad reasoned opinions, but it could be assumed that, with a general concession in this regard, the number of reasoned opinions would grow. In consequence of ‘excessive and unfocussed’ use of the subsidiarity review, as was argued by Franz Mayer before the German Bundestag, the expected effect of the EWS to raise more subsidiarity awareness (*Subsidiaritätsbewusstsein*) among EU institutions would be ‘significantly weaken[ed].’²⁵⁹ This speaks against the ‘intermediate’ view (one that is between narrow and broad scrutiny) that national parliaments should not be stopped from commenting on all sorts of issues, in the framework of their EWS reasoned opinion, but that their formal reasoned opinion (or rather, the conclusions of their opinion) should be restricted to subsidiarity issues.

²⁵⁷ CONV 286/02, Point I (2).

²⁵⁸ Weatherill, ‘Competence creep and competence control’, 44.

²⁵⁹ Deutscher Bundestag, Protokoll der 8. Sitzung des Rechtsausschusses-Unterausschuss Europarecht, ‘Öffentliches Expertengespräch zu dem Thema: “Prüfung des unionsrechtlichen Subsidiaritätsprinzips”’, 16.06.2010, see expertise of Franz Mayer, p. 12 (own translation).

Table – Arguments in Reasoned Opinions on EPPO Proposal which were not qualified by the Commission as subsidiarity arguments

Argument in Reasoned Opinion	Commission Reply to Argument	Member States	Chamber	Date of Reply
Criminal law is a national competence	Criminal law remains a competence of Member States but the MS and the Union are obliged to combat crimes against EU budget. Art 86 TFEU allows for the establishment of EPPO.	Netherlands Ireland Hungary Malta	Tweede Kamer Oireachtas Országgyűlés Kamra tad-Deputati	13.3.2014 14.3.2014 14.3.2014 13.3.2014
Criticism of decentralised and integrated EPPO structure / model Preference for College model	Respects national legal traditions and judicial systems. EDPs remain national prosecutors familiar with domestic jurisdiction. Investigative measures carried out by national law enforcement authorities. Judicial review by national courts. Accused persons tried on the basis of national law by national judges. Commission guided by principles of independence, accountability and efficiency are safeguarded. College model to decide on internal rules is envisaged. Commission open to consider options.	Netherlands France Romania Malta Cyprus	Tweede Kamer Senat Camera Deputatilor Kamra tad-Deputati Vouli ton Antiprosopon	13.3.2014 13.3.2014 19.3.2014 13.3.2014 13.3.2014
EPPO powers too far-reaching	All powers are needed to effectively perform tasks of consistent and efficient protection of the EU budget. Need recourse to all investigative measures. Most far reaching measures would require authorisation of national judicial authority. EDPs are national prosecutors and measures are executed by national authorities.	Netherlands Sweden Cyprus	Tweede Kamer Riksdag Vouli ton Antiprosopon	13.03.2014 18.03.2014 13.3.2014

Argument in Reasoned Opinion	Commission Reply to Argument	Member States	Chamber	Date of Reply
Creation of EPPO limits prerogative of national authorities to prioritise investigation and prosecution activities.	Objective of EPPO is to increase number of investigations and prosecutions affecting Union's financial interests. Currently often not investigated or prosecuted. In case of conflict of priorities, EDP will give priority to Union budget crimes after consultation. Consultation intended to limit interference with national priorities. EPPO complements national capacity to fight EU fraud. In areas unrelated to Union fraud, Regulation would be without prejudice regarding priorities of investigation and prosecution.	Netherlands Romania [shorter reply]	Tweede Kamer Camera Deputatilor	13.3.2014 19.3.2014
Proposal goes beyond what is necessary to achieve the objects of the Union / Proportionality	Alternatives were considered but found not to achieve objectives effectively. Proposal strikes balance between efficient protection of EU financial interests and impact on national jurisdiction. Therefore proportionality is given.	France Sweden UK	Senat Riksdag House of Commons	13.3.2014 18.3.2014 11.4.2014
EPPO qualifications according to national law	Member States propose candidates. Can ensure they possess necessary qualifications required for national prosecutors.	Romania	Camera Deputatilor	19.3.2014
Explain details of judicial review of procedural measures	EPPO exercise functions of prosecutor in competent courts of Member States. EPPO considered a national authority for purposes of judicial review. Challengeable acts would be reviewed in national courts. Concerning procedures, no deviation from the rule of the law of the Member State.	Romania	Camera Deputatilor	19.3.2014
Remove instruction powers of the European Delegated Officers	Objective of EPPO is to ensure Union-wide coherent and efficient approach to investigations. Some powers of central office must be preserved to streamline investigations.	Romania	Camera Deputatilor	19.3.2014

Argument in Reasoned Opinion	Commission Reply to Argument	Member States	Chamber	Date of Reply
Risk of overlap and interference with national prosecution actions because 'financial interests of the Union' is not provided for in proposal.	Term defined in Art 2.c of proposal. Art 12 and 13 clearly delineate EPPO competences from national authorities	Romania	Camera Deputatilor	19.3.2014
Regime of liability	Art 69 in line with Art 340 TFEU. Commission takes note of view that there might be a need to establish recovery procedure for damages caused by EPPO actions.	Romania	Camera Deputatilor	19.3.2014
Introduction of provisions related to recovery of legal expenses	Duty to counter fraud and other illegal activities remains equally with the Union and Member States. EPPO aims to protect EU budgets and have proper efficient management of EU funds. This protects both EU and Member States. Without EPPO Member States would be solely responsible to carry out investigations.	Romania	Camera Deputatilor	19.3.2014
Data protection	rec 42 states EC 45/2001 on protection of personal data would apply	Czech	Senat	13.3.2014
EPPO should act with third countries through Member States	Member States shall recognise EPPO as competent authority for implementation of agreement on legal assistance in criminal matters and extradition. EPPO may request Eurojust support.	Czech	Senat	13.3.2014
Violation of fundamental rights (lawful judge; fair trial; absence of procedure governing conflicts of interest.	Art 11(1) ensures Fundamental Rights protection. EPPO is national authority for purposes of judicial review. ECJ can interpret Regulation and ensure uniform application via preliminary reference procedure. Judicial review also applies to choice of jurisdiction. Art 27 provides clear strict and objective criteria, leaving EPPO limited discretion. Conflict of interest cases can be brought before EPP. Overall, concerns over fundamental rights are not arguments challenging conformity with subsidiarity.	Czech Cyprus [short reply, slightly different]	Senat Vouli ton Antiprosopon	13.3.2014 13.3.2014

Argument in Reasoned Opinion	Commission Reply to Argument	Member States	Chamber	Date of Reply
Challenge to added value of EPPO	Benefit of EPPO lies in European nature, ensuring better coordination and efficiency, better use of resources and better deterrence.	Hungary	Országgyűlés	13.3.2014
National Attorney General should not be subject to direction or control of another person	EPPO would have no power	Malta	Kamra tad-Deputati	14.3.2014
Impact on national constitutional and legal arrangements and work of national bodies	Reply similar to others above [fair balance; respects national arrangements] UK: Impact on national systems not per se sufficient to violate subsidiarity	Slovenia UK	Državni Zbor House of Commons	18.3.2014 11.4.2014
Commission Impact Assessment did not include regional and local efforts	Regional and local efforts are not more effective than national ones	UK	House of Commons	11.4.2014
Separation of arguments about subsidiarity and non-subsidiarity	In line with Barroso letter of 1 Dec 2009	UK	House of Commons	11.4.2014

Chapter 3: Design of the *ex ante* subsidiarity review at the national level

Introduction

The process of European integration imposes new challenges on the national parliaments of Member States of the European Union. However, national legislative bodies are, according to Wessels and Maurer, ‘slow and retarding adapters’ in response to changes in the EU system.¹ At the beginning of the European integration process, national parliaments were supposed to adopt two main functions regarding EU affairs: transposition of EU law into the national legal order and, depending on the constitutional system, scrutiny of the position taken by respective national governments in the Council. With the Treaty of Lisbon, further reforms of national parliaments were needed, especially for the most vital new function: subsidiarity review.

Against this background, this chapter reviews whether national parliaments are prepared to be ‘responsible for integration.’² This responsibility derives from the observation that in the EU ‘the legitimization of supranational secondary acts cannot be directly constructed (...) the institution with the greatest base of legitimacy should be involved.’³ Such institutions are, primarily, the national parliaments. Adjustments for subsidiarity scrutiny at the national level indicate the readiness of national parliaments to accept their new role and to improve their effectiveness at the EU level. Specifically, the internal organization for subsidiarity scrutiny is a crucial point to be developed in the debate about the new role of national parliaments in the EU. Because the adaptation of the internal legislative organization for the EWS is in hands of the Member States, the effectiveness of national parliaments’ largely relies on how these procedures are designed at the national level.

This chapter is structured as follows: first, in Section 1, I review the institutional changes of national parliaments related to the process of European integration. I explore whether the structures of national parliaments have undergone an ‘active institutional Europeanization’ by ‘implement[ing] a variety of institutional reforms to enhance their participation in European affairs,’ as had taken place in the pre-Lisbon Treaty period with regard to information rights,

¹ Maurer and Wessels, ‘National Parliaments after Amsterdam: From Slow Adapters to National Players?’ at 461.

² BVerfG, 2 BvE 2/08, judgment of 30.6.2009, para. 245 (English version).

³ Frank Schorkopf, ‘The European Union as an Association of Sovereign States: Karlsruhe's Ruling on the Treaty of Lisbon’ (2009) 10 German Law Journal 1219, 1235.

the creation of EU affairs committees and resolutions on EU draft legislative acts.⁴ Section 2 of this chapter will focus on constitutional jurisprudence, and more specifically, on recent judgments of constitutional courts in Europe urging national parliaments to adjust provisions to accommodate new functions. Next, I categorize various types of parliamentary adjustments to the innovations brought about by the Treaty of Lisbon (Section 3). I limit the scope to *ex ante* review (the preparation of reasoned opinions), whereas the *ex post* review (actions before the ECJ) is discussed in the next chapter. Both types of review seem to be the biggest challenge of all the Lisbon related reforms for national parliaments, both at national and regional level. The core of this chapter deals with the review of all of the national systems of subsidiarity review, which opens my methodological ‘accordion,’ to show all possible types of scrutiny a global examination of all the national systems is necessary. Due to space constraints, only some of the procedures are reconstructed in detail in this chapter in order to capture how differences, even those that are seemingly inconsequential at first sight, are crucial for the effectiveness of the procedure. The remaining procedures are discussed in the annexed table. Additionally, in Section 3, I consider the role played by regional parliaments in some of the Member States included in this comparison. In Section 4, I compare the institutional adjustments for *ex ante* review based on the following variables: the moment of detection of a subsidiarity violation, the initiative to draft a reasoned opinion, the role of the government, and the role of the plenary session. My review of different types of *ex ante* scrutiny is followed by a study of the latest Commission reports on the activity of national parliaments concerning subsidiarity scrutiny (Section 5). At this point, I explore whether the choice of the scrutiny procedure has an impact on the activity of a parliament in the EWS. The chapter concludes with a short summary of national parliament adjustments for the *ex ante* review, and counsels in favour of further assessment of the content of the reasoned opinions issued by national parliaments, which is provided for in Chapters 6 and 7.

1 Institutional evolution of national parliaments under European integration

Under the original treaties establishing the European Communities, most legislative bodies of the original six Member States did not alter their internal structures in response to the process of European integration. National parliaments neither had nor were in search of a formally

⁴ Katrin Auel and Arthur Benz, ‘The politics of adaptation: The Europeanisation of national parliamentary systems’ (2005) 11 *The Journal of Legislative Studies* 372, 373.

ascribed function in EU affairs.⁵ At the time, governments were in a strong position at the EU level, and although some national parliaments (namely, the German, Belgian, Italian and Dutch) had established European Committees, such committees wielded only marginal influence.⁶ Subsequently, the parliaments in the UK and Denmark established EU Affairs Committees, in order to safeguard the strong constitutional position of such parliaments after accession to the EC.⁷

The institutional design of national parliaments underwent changes during the process of treaty reform, which shifted many national competences to the EU level. The Commission White Paper on the Single Market and the Single European Act mark an important stage in this process, because it moved some of the more essential competences from the national to the EU level. Subsequently, three major changes in the attitude of national parliaments towards European integration can be identified. Both Norton and Maurer and Wessels note,⁸ first, the greater specialisation of parliamentarians concerning policy areas and functions of parliaments, especially due to the establishment of EC Committees. Second, committees became more involved in the management of European affairs, as indicated by the increase in time dedicated to the analysis of documents for Council meetings and the implementation of directives. Third, parliamentary bodies underwent segmentation and fragmentation (developments connected to the greater involvement of specialised committees on European affairs) and Members of the European Parliament became involved in the work of advisory committees.

Later, the Maastricht Treaty brought about a need for further adjustments at the national level, strengthening the participation rights of parliaments, especially regarding information rights. For example, in 1992, France and Germany regulated the position of the national parliament in EU affairs at the constitutional level.⁹ Concomitantly, specialised committees became more involved in EU affairs, particularly as a result of the growing workload of EU Affairs Committees.¹⁰ The remaining treaties, while referring to national parliaments, did not have the same effects as earlier EU reforms. For example, the Amsterdam Treaty, even

⁵ Philip Norton, 'Introduction: Adapting to European integration' in Philip Norton (ed), *National parliaments and the European Union* (Frank Cass 1996) at 23.

⁶ Maurer and Wessels, 'National Parliaments after Amsterdam: From Slow Adapters to National Players?' at 437.

⁷ Norton at 24.

⁸ Ibid at 25; Maurer and Wessels, 'National Parliaments after Amsterdam: From Slow Adapters to National Players?' at 435.

⁹ Art 4 La loi constitutionnelle n° 92-554 du 25 juin 1992; Art 1 Gesetz zur Änderung des Grundgesetzes v. 21.12.1992 BGBl. I 92, 2086.

¹⁰ O'Brennan and Raunio at 12.

though it contained a Protocol on the role of national parliaments, did not affect national institutional design to the same extent as the Maastricht Treaty.¹¹ Likewise, Declaration No. 23 attached to the Nice Treaty did not have a substantial impact, although it placed national parliaments on the agenda for the Intergovernmental Conference in 2004. With the Constitutional Treaty, some parliaments saw an incentive to reform their internal organisation in order to accommodate new powers; however that treaty did not come into force.¹²

National parliaments finally gained new powers through the ratification of the Treaty of Lisbon and the changes to national institutional design it triggered. Adjustments specifically allowed for the participation of national legislative bodies in future treaty changes and in subsidiarity review. In 2008, Germany and France amended their constitutions to accommodate the participation rights of national parliaments in subsidiarity scrutiny.¹³ This level of reform reflected the importance of national parliaments' participation in the EU legislative process for national constitutional systems. In addition to the amendment of constitutions, most Member States introduced reforms of infra-constitutional law, especially to the rules of procedure, in order to accommodate subsidiarity review.

Before exploring the newly established procedures for ex-ante scrutiny, the next section looks at the constitutional case law, which stressed the role of national parliaments in European integration, and the necessity of adapting national provisions in order to reflect their significance.

2 Analysis of Constitutional Jurisprudence

Some constitutional courts have emphasised the importance of participation of national parliaments in EU affairs and demanded constitutional or infra-constitutional adjustments for this purpose. This section examines the decisions of the German, French and Polish constitutional courts concerning the new functions of national parliaments.

2.1 Germany

The judgment of the German Federal Constitutional Court in June 2009 held that the new institutional role of national parliaments introduced by the Treaty of Lisbon does not

¹¹ Maurer and Wessels, 'National Parliaments after Amsterdam: From Slow Adapters to National Players?' at 462.

¹² See for example the UK House of Commons, Modernisation Committee Second Report, Session 2004- 2005, para. 113-118.

¹³ Art 1 Gesetz zur Änderung des Grundgesetzes Artikel 23, 45 und 93 v. 08.10.2008 BGBl. I 2009, 1926; Art 43 and 47 Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République.

compensate the legitimacy deficit based on the EP elections, and does not rectify the legitimacy deficit in the EU, as the reduced number of decisions demanding unanimity and supranationalisation of police and judicial cooperation in criminal matters diminishes the role played by national parliaments in the EU decision making process.¹⁴ In the view of the Constitutional Court, only the national parliaments, and not the EP, may safeguard democracy at the European level. In this respect, the Court introduced the new concept of ‘responsibility for integration’ (*Integrationsverantwortung*), applicable to all state organs, which are obliged to ensure that the political systems of Germany and the EU remain in compliance with the principle of democracy according to the German Basic Law.¹⁵ The ‘responsibility for integration’ should be understood as a counterbalance to the dynamic developments of European integration and the lack of direct legitimacy of secondary legislation.¹⁶ In such a situation, the national parliament, as the state organ with the most legitimacy, should take over the responsibility for integration. The responsibility for integration guarantees the participation of the Bundestag and the Bundesrat not only for treaty changes, but also compels these parliamentary chambers to ‘politically accompany’ decisions taken by the EU.¹⁷

Changes of national provisions had to be introduced in order to meet the obligation of ‘the responsibility for integration.’ Even though the Federal Constitutional Court ruled that both the Act Approving the Treaty of Lisbon¹⁸ and the Act Amending the Basic Law (Articles 23, 45 and 93)¹⁹ were compliant with the Basic Law, it ruled that the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat,²⁰ regulating the participation of the Bundestag and the Bundesrat in EU affairs, contradicts Article 38.1 in connection with Article 23.1 of the Basic Law. The act did not sufficiently safeguard the participation rights of the Bundestag and the Bundesrat. According to the Federal Constitutional Court, a new legal act should ‘take into account that [the Bundestag and the Bundesrat] must exercise their responsibility for integration in numerous cases of dynamic development of the treaties.’²¹

¹⁴ BVerfG, 2 BvE 2/08, judgment of 30.6.2009, para 293-294.

¹⁵ Ibid, para 238 - 245.

¹⁶ Schorkopf at 723.

¹⁷ Martin Nettesheim, ‘Die Integrationsverantwortung-Vorgaben des BVerfG und gesetzgeberische Umsetzung’ (2010) 63 Neue Juristische Wochenschrift: NJW 177.

¹⁸ Zustimmungsgesetz zum Vertrag von Lissabon, Gesetz v. 8.10.2008 zum Vertrag von Lissabon v. 13.12.2007 BGBl. II 2008, 1038.

¹⁹ Gesetz zur Änderung des Grundgesetzes Artikel 23, 45 und 93 v. 08.10.2008 BGBl. I 2009, 1926.

²⁰ Gesetz über die Ausweitung und Stärkung der Rechte des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union, BT-Dr 16/8489.

²¹ BVerfG, 2 BvE 2/08, judgment of 30.6.2009, para 411.

The Court indicated how to shape the new provisions: to fulfil their role, the Bundestag and the Bundesrat should be equipped with appropriate powers at the national level.²² Regarding the subsidiarity review, the Constitutional Court specifically stated that the effectiveness of the EWS ‘depends on the extent to which the national Parliaments will be able to make organisational arrangements that place them in a position to make appropriate use of the mechanism within the short period of eight weeks.’²³ The Court also expressed concern regarding the scope of the subsidiarity action, specifically whether the action of the national parliaments and of the Committee of the Regions will be extended to assessing ‘whether the European Union has competence for the specific lawmaking project.’²⁴

During the summer of 2009, after the Federal Constitutional Court issued its judgment, Germany introduced new laws regulating the participation of the Bundestag and the Bundesrat. Nevertheless, these changes, according to some scholars, do not satisfy the core idea of the responsibility for integration.²⁵ Moreover, since three different laws regulate the matter, the procedure is not sufficiently transparent²⁶ and for this reason, some propose that the parliament should draw up a ‘German Code on European Law.’²⁷

2.2 France

In France, the Conseil Constitutionnel considered, in response to a request from the President of the Republic pursuant to Article 54 of the Constitution (on references concerning the constitutionality of international treaties), whether the authorization to ratify the Treaty of Lisbon required prior revision of the Constitution. In its decision, the Council recognized the new role of national parliaments in the activities of the European Union.²⁸ However, it was essential to analyse whether these new competences could be applied within the framework of the current provisions of the Constitution. The ‘important role given to the national

²² Ibid, para 411-419. However, the failure of the Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat was connected with the treaty amendment procedures and not on the subsidiarity review.

²³ Ibid, para 305.

²⁴ Ibid.

²⁵ Nettesheim at 182. The changes are limited to the direct consequences of the judgment and do not include, e.g., the parliament oversight in the application of energy competence by the EU (Article 194 TFEU).

²⁶ Ibid at 183.

²⁷ Christian Calliess and Tim Beichelt, ‘The Europeanization of the Bundestag: From Observer to Player?’ <http://www.bertelsmann-stiftung.de/cps/rde/xbcr/SID-BDF67703-3D1034DF/bst/xcms_bst_dms_39243_39244_2.pdf> accessed 17 August 2014 at 31.

²⁸ Conseil Constitutionnel, Décision n° 2007-560 DC, 20 January 2007 (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community) p. 28-32. The Council invoked the principle of subsidiarity stating that: ‘implementation of this principle may not suffice to preclude any transfers of powers authorized by the Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercising of national sovereignty.’ (at p. 16).

parliaments by the Lisbon Treaty’ – the power of the French parliament to oppose certain aspects of family law subject to the ordinary legislative procedure, and to ensure compliance with the principle of subsidiarity – required a revision of the Constitution in order to allow the parliament to exercise its functions.²⁹ As a consequence, France added Article 88-6 to Title XV on the European Union in order to provide for the subsidiarity check.³⁰

2.3 Poland

In Poland, as early as 2005, the Constitutional Court stressed the need to ensure that both the Sejm and the Senat participate in the process of EU law drafting.³¹ However, until the Treaty of Lisbon, the necessary changes to Polish law were not introduced, due to a lack of political will.³² As a consequence, in its *Lisbon Treaty* judgment, the Constitutional Court emphasized the significance of Article 3 of Protocol No. 1 which foresees that national parliaments may issue reasoned opinions on EU draft legislative acts and enables the Polish parliament to shape the content of EU law ‘to the extent (...) that it is possible to narrow down the scope of its “external character” in relation to the Polish state.’³³ In this respect, the Constitutional Court left it to the legislature to take the legal measures to accommodate this procedure, and to establish the principles shaping the cooperation of government with the Sejm and the Senat in EU affairs.³⁴

The decisions of constitutional bodies in Germany, France and Poland underlined the importance of national parliaments for the participation of these Member States in the affairs of the European Union. Whereas the role of national parliaments, including their scrutiny of the subsidiarity principle, was elevated to the level of a constitutional amendment in

²⁹ Jean-Claude Piris, *The Lisbon Treaty: a legal and political analysis* (Cambridge University Press 2010) at 128.

³⁰ Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République

³¹ Trybunał Konstytucyjny, K 24/04 judgment of 12.01.2005, inequality in competences of Sejm and Senat committees in respect of European Union legislative proposal. The Court stated that influencing the position of the government is in fact a legislative function. As long as the bi-cameral Parliament is to be maintained, both chambers should be guaranteed equal participation in activities concerning the shaping position of Poland in the field of adopting EU law. Cf. Adam Łazowski, ‘The Polish parliament and EU affairs: an effective actor or an accidental hero?’ in John O’ Brennan and Tapio Raunio (eds), *National parliaments within the enlarged European Union: from ‘victims’ of integration to competitive actors?* (Routledge 2007) at 212-214.

³² Aleksander Fuksiewicz, ‘Sejm i Senat rok po wejściu w życie Traktatu Lizbońskiego-dostosowanie do reformy instytucjonalnej’ <<http://www.isp.org.pl/uploads/pdf/1827766553.pdf>> at 11.

³³ Trybunał Konstytucyjny, K 32/09 judgment of 24 November 2010, p. 31. The Court, following the Polish doctrine, sees EU law as an order that is ‘partially external’ to Polish law. Even though the Polish legal system is generally seen by the Court as ‘multicentric’ meaning that EU legal acts have a legal force in Poland, the Court underlines that EU primary law comes into force as accepted by all Member States, while EU secondary law by the national representatives in the Council and the representatives of European citizens (including Polish) in the EP. The element of ‘externality’ is hence that it is not the Polish legislator who constitutes EU law.

³⁴ Trybunał Konstytucyjny, K 32/09, p. 31.

Germany (albeit only for ex-post scrutiny) and France, in Poland this procedure remained at the level of infra-constitutional law, probably due to the inflexibility of the Polish Constitution.³⁵ In the next Section, I will explore the details of Member States' institutional design concerning subsidiarity scrutiny.

3 Overview of scrutiny types

Kiiver argues that national parliaments retained autonomy with regard to internal procedures for the subsidiarity scrutiny, and that the only requirement that these procedures need to fulfil is that, under the national law they must be regarded as adopted by the parliament or a chamber thereof.³⁶ Following this view, in this section, I will categorize scrutiny systems utilized by parliamentary committees when assessing the compatibility of EU draft legislative acts with the principle of subsidiarity.³⁷ For each of the categories, I provide a detailed review of the mechanism; similar systems are then listed and elaborated in an annexed table.

An analysis of Member States indicates the existence of four types of scrutiny of the principle of subsidiarity: centralized, mixed, decentralized and 'subsidiarity-focused'. First, a single dominant committee, the EU Affairs Committee, characterizes the *centralised* system; there is no delegation to specialized committees (this is the case for the Polish Sejm, both Austrian chambers, as well as the Maltese, Croatian and Hungarian parliaments). The scrutiny system may also be double-centralized, in the sense that there is one joint committee for two parliamentary chambers (as is the case in Spain). Another type includes subcommittees of the EU Affairs Committee on specialized EU affairs disciplines (the UK).

Second, subsidiarity scrutiny may have a *mixed* character, including a few subcategories:

- a) The domination of the EU Affairs Committee with the approval of specialized committees (French Senate, Estonia)
- b) The domination of the EU Affairs Committee with the prior consultation of specialised committees (Finland, Bulgaria, Greece, Italian Camera dei Deputati, Latvian Seima, Lithuanian Seimas, Portugal, Cypriot Czech and Danish parliaments, French Assembly)

³⁵ Art 235 of the Polish Constitution.

³⁶ Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality* at 25.

³⁷ P. Kiiver adopts similar categories with regard to the parliamentary committees that scrutinize EU affairs in general: centralized, decentralized systems and 'middleway models' such as: system of delegated scrutiny with centralised briefing or system of coordination. Cf. Philipp Kiiver, *The national parliaments in the European Union: A critical view on EU constitution-building*, vol 50 (Kluwer law international 2006) at 47-54.

- c) The domination of specialized committees with a sifting role of the EU Affairs Committee (Luxembourg, Belgian Chambre des Représentants)
- d) The domination of specialized committees with final approval of the EU Affairs Committee (German and Romanian parliaments)

Third, a scrutiny system may take a *decentralized* form, where only a specialized committee conducts scrutiny (the Netherlands, Eerste Kamer, Belgian Sénat, both Irish chambers and the Italian Senato).

The fourth ‘*subsidiarity focused*’ form includes a committee that deals exclusively with subsidiarity issues; such an organ has only functioned for a certain period in the Netherlands.

From the pool of all the chambers, I have chosen representative examples for each category in order to present a closer description of each type of scrutiny. The scrutiny procedures of the remaining chambers are listed in the table annexed to this chapter.³⁸ The parliaments selected for the overview have adopted one of the scrutiny types: centralised; mixed; decentralised; or subsidiarity-focused.

3.1 Centralised Scrutiny System

3.1.1 Poland (Sejm)

The Polish parliament, which consists of the Sejm (lower chamber) and the Senat (upper chamber),³⁹ was involved in EU affairs even prior to Poland’s accession to the EU, mainly in relation to the approximation of national law to EU law.⁴⁰ Nonetheless, the constitutional provisions do not provide for any important role in EU affairs, due to the leading role of the Council of Ministers and the President in this respect.⁴¹ Currently, the Cooperation Act⁴² and the Rules of Procedure of the Sejm⁴³ and the Senat⁴⁴ regulate subsidiarity review. The

³⁸ All the procedures in detail see Claudia Heffler and others (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015 forthcoming).

³⁹ Article 96 of the Constitution.

⁴⁰ Łazowski at 207.

⁴¹ Article 146 and Article 133 of the Constitution.

⁴² Ustawa z dnia 8 października 2010 r. o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej, Dz. U. Nr 213 Poz. 1395.

⁴³ Uchwała Sejmu Rzeczypospolitej Polskiej z dnia 30 lipca 1992 r., Regulamin Sejmu Rzeczypospolitej Polskiej, M.P. 1992 nr 26 poz. 185.

⁴⁴ Uchwała Senatu z dnia 23 listopada 1990 r., Regulamin Senatu, M.P. 1991 nr 2 poz. 11.

Constitution does not provide for a subsidiarity review in its text; moreover, planned constitutional changes also do not explicitly mention subsidiarity review.⁴⁵

For subsidiarity scrutiny, the lower chamber utilizes the centralized model,⁴⁶ whereas the upper chamber uses a mixed one, where the EU Affairs Committee and specialized committees work together on formulating a reasoned opinion.⁴⁷ As a consequence, the purpose of this section is to present the centralized subsidiarity scrutiny of the European Affairs Committee of the Sejm, which was established in 2004.⁴⁸

The Cooperation Act and Rules of Procedure regulate the subsidiarity review of the Sejm. Article 148cc par. 1-5 of the recently adjusted Sejm Rules of Procedure provides that either the EU Affairs Committee or a group of fifteen MPs can bring resolution in response to subsidiarity violations, with a reasoned opinion attached to a motion stating the grounds.⁴⁹ Additionally, the first reading of this resolution takes place within the EU Affairs Committee, without the possibility of attaching an amendment thereafter. If adopted, the Marshall of the Sejm will forward the resolution to the relevant EU institution.

Furthermore, the new Cooperation Act obliges the government to cooperate with the Sejm and the Senat in 'affairs connected to the membership in the EU.'⁵⁰ In particular, the Cooperation Act states that the Council of Ministers must forward an opinion on draft legislative acts from EU institutions no later than fourteen days after receipt thereof.⁵¹ The opinion of the Council of Ministers should contain an impact assessment of legislative acts on the Polish legal, social, economic and financial systems and information on the type of EU legislative procedure. The statement on compatibility with the principle of subsidiarity is also an indispensable component of the opinion.⁵² Moreover, the appropriate Sejm organ (in this

⁴⁵ The recent development concerning the participation of the Polish parliament in EU affairs contains the project of the constitutional amendment, so-called 'European-Chapter'. Before the elections in 2011, the project of the President foresaw new Article 227h par. 2. This provision guaranteed the exercise of the Sejm and the Senat's powers in the form and scope defined by the EU treaties. A similar provision (Art. 227 d par. 1), however with a reference to infra-constitutional act (on the cooperation) contained the project proposed by one of the political parties Prawo i Sprawiedliwość. Projects available at:

[http://orka.sejm.gov.pl/Druki6ka.nsf/0/0FA39CE6B812715AC12577E400489FEF/\\$file/3598.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/0FA39CE6B812715AC12577E400489FEF/$file/3598.pdf) and [http://orka.sejm.gov.pl/Druki6ka.nsf/0/AC1310990AB3FCA7C12577F9003C7668/\\$file/3687.pdf](http://orka.sejm.gov.pl/Druki6ka.nsf/0/AC1310990AB3FCA7C12577F9003C7668/$file/3687.pdf)

⁴⁶ However, see the written evidence from the EU Affairs Committee of the Polish Sejm to the House of Lords, which pointed out that the Sejm's sectoral committees are now more involved in scrutiny work and that joint meetings between the EU affairs committee and sectoral committees are sometimes held.

⁴⁷ Procedura Badania Pomocniczości w Sejmie,

http://oide.sejm.gov.pl/oide/images/files/badanie_pomocniczosci/subsidiarity_sejm_table_pl.pdf

⁴⁸ Art 1 pkt 1 Sejm Rules of Procedure.

⁴⁹ Art 1 pkt 1 Sejm Rules of Procedure.

⁵⁰ Art 1 and 2 Sejm Rules of Procedure.

⁵¹ Art 7 Cooperation Act.

⁵² Art 7 par. 3, n. 3 Cooperation Act.

case, the Committee on EU affairs) may issue an opinion on a draft act within forty-nine days of receipt of the draft act by the Council of Ministers.⁵³ If the period provided by the Commission is shorter than fifty-six days, then the Council of Ministers is obliged to present its opinion to parliament within one-quarter of the time provided by the European Commission.⁵⁴ Although the Council of Ministers does not issue statements concerning other draft acts, it will still prepare an opinion at the request of the committees of the Sejm or the Senat.

3.1.2 Spain

The Spanish parliament, Cortes Generales, consists of two chambers: the Senado (upper) and Congreso de los Diputados (lower). The parliament participates in EU affairs through the Joint Committee for the EU (Comisión Mixta para la Unión Europea), which controls EU affairs on the basis of Ley 24/2009, introduced in December of 2009 to implement the Lisbon Treaty's provisions, and amending the already existing Ley 8/1994.⁵⁵ Moreover, as of 2010, the resolution of presidiums of both chambers regulates subsidiarity review.⁵⁶ These reforms are a 'fundamental change' for Spain, as the government previously limited the activity of the Joint Committee of EU affairs by not immediately forwarding relevant documents.⁵⁷

The Bureau of the Speaker and the Joint Committee constantly monitor documents received from EU institutions. The Joint Committee may also request additional information from the government or a note concerning EU documents, including information on the principle of subsidiarity.⁵⁸ The government has a maximum of two weeks to submit such an evaluation.⁵⁹ The initiative to start a subsidiarity review may come from the Bureau of the Speaker or that of the Joint Committee; in such case, they shall appoint a rapporteur to prepare a proposal for a reasoned opinion.⁶⁰ Two political groups, or one-fifth of the members of the Joint

⁵³ Art 7 par. 4 Cooperation Act.

⁵⁴ Art 7 par. 5 Cooperation Act.

⁵⁵ Ley 24/2009, de 22 de diciembre, de modificación de la Ley 8/1994, de 19 de mayo, por la que se regula la Comisión Mixta para la Unión Europea, para su adaptación al Tratado de Lisboa de 13 de diciembre de 2007. For the history of this regulation see Sonia Piedrafita, 'The Spanish Parliament and EU Affairs in the Post Lisbon Treaty Era: All Change?' (2014) *Journal of Legislative Studies* 18.

⁵⁶ Resolución de las Mesas del Congreso de los Diputados y del Senado, de 27 de mayo de 2010, sobre reforma de la Resolución de las Mesas del Congreso de los Diputados y del Senado, de 21 de septiembre de 1995, sobre desarrollo de la Ley 8/1994, de 19 de mayo, por la que se regula la Comisión Mixta para la Unión Europea, para su adaptación a las previsiones del Tratado de Lisboa y de la Ley 24/2009.

⁵⁷ Silvia Delgado del Saz, 'Die Rolle der nationalen Parlamente nach dem Vertrag von Lissabon - ein Vergleich zwischen spanischem und deutschem Recht' *Berliner Online-Beiträge zum Europarecht* <http://portal-europarecht.de/index.php?option=com_jdownloads&view=viewcategory&catid=5&Itemid=12> at 22.

⁵⁸ Art. 3 j), Ley 24/2009 and Resolución, Séptimo, par. 3.

⁵⁹ Resolución, Séptimo, par.3.

⁶⁰ Resolución, Octavo, par. 1.

Committee, may also initiate a subsidiarity review within four weeks after the parliament receives an EU draft legislative act.⁶¹ Their request must already be accompanied by a reasoned opinion.⁶² An application for an urgent hearing with a representative of the government (or other authority or public official) to explain the position of the government, or regarding some aspect of the European proposal, may also accompany the request.⁶³ The Bureau of the Joint Committee must approve this request, effectively determining whether the hearing is held before the Joint Committee or a working group created for the matter in question.⁶⁴ Next, the opinion is distributed to the members of the Joint Committee, and members, if they so desire, may propose alternative opinions or changes within five days.⁶⁵ Afterwards, MPs debate and vote on the opinion in the Joint Committee according to the procedure provided for non-legislative decisions.⁶⁶ At this time, discussions of the reasoned opinion may take place in the presence of government representatives, who explain the position of the government.⁶⁷ During the discussion of a reasoned opinion, the MPs may make minor amendments of a technical or grammatical character.⁶⁸ In fact, however, thus far, the Committee has adopted the reasoned opinions by means of the “silent” consent of the committee members, with no debate or voting.⁶⁹ If the Joint Committee adopts a reasoned opinion, opinions issued by the parliaments of autonomous communities are attached.⁷⁰

The plenaries of both chambers may participate in the procedure.⁷¹ In such a case, the presidiums of both chambers have two days to propose alternative projects or amendments to the existing project. Each chamber then separately takes a decision. The President of one of the chambers forwards the approved reasoned opinion (either by Joint Committee or the chambers) to EU institutions, as well as informing the government.⁷²

3.1.3 The United Kingdom

The British parliament consists of the House of Commons (lower chamber) and the House of Lords (upper chamber). In the UK, parliamentary control over the EU legislative process is

⁶¹ Ibid.

⁶² Ibid.

⁶³ Resolución, Octavo, par. 2.

⁶⁴ Resolución, Octavo, par. 1.

⁶⁵ Resolución, Octavo, par. 4.

⁶⁶ Resolución, Octavo, par. 5.

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Piedrafita at 16.

⁷⁰ Resolución, Octavo, par. 6.

⁷¹ Art 5.2. Ley 24/2009, Resolución, Octavo, par. 7.

⁷² Art 5.3 Ley 24/2009.

political rather than legal or constitutionalized, in the sense that the focus is on political control over ministerial accountability.⁷³ EU Affairs committees have existed in both chambers since the 1970s: the European Scrutiny Committee (ESC) in the House of Commons and the Select Committee on the EU in the House of Lords.⁷⁴ Over time, the parliament has altered procedures in both committees to control expanding EU competences. Nowadays, parliamentary scrutiny in the UK consists of two basic elements: the analysis of EU documents and the application of scrutiny reserve resolutions, meaning that a Minister cannot agree to an EU proposal that is still under scrutiny.⁷⁵ The latter feature in particular had a bearing on the UK parliament's position in Working Group I of the Convention; British MPs argued for improvements concerning the political accountability of ministers in the context of subsidiarity.⁷⁶

The House of Commons has a European Scrutiny Committee, with ad hoc specialist European Committees.⁷⁷ However, also the House of Commons' 'Departmental Select Committees may inquire into relevant EU policy and legislation.'⁷⁸ The EU Committee of the Lords functions 'in an entirely different context within its House as there is no separate Departmental Select Committee system.'⁷⁹ The House of Lords has a 'central' EU Committee, which appoints six subject-specialist sub-committees, in a way in 'which policy expertise and familiarity with the workings of the EU can be combined.'⁸⁰

In the House of Commons, the same procedure as indicated in Standing Order No. 143 for the motions relating to EU documents applies for subsidiarity scrutiny. The provisions do not establish the organ responsible for identifying noncompliant proposals and drafting reasoned

⁷³ Christopher Kerse, 'Parliamentary scrutiny in the United Kingdom parliament and the changing role of National Parliaments in European Union Affairs' in Gavin Barrett (ed), *National parliaments and the European Union: the constitutional challenge for the Oireachtas and other member states legislatures* (Clarus Press 2008) at 352. Also Adam Cygan, 'EU Affairs before the United Kingdom Parliament; A Case of Scrutiny as Substitute Sovereignty?' in Olaf Tans, Jit Peters and Carla M Zoethout (eds), *National parliaments and European democracy: a bottom-up approach to European constitutionalism* (Europa Law Publishing 2007) at 81.

⁷⁴ Kerse at 353.

⁷⁵ Ibid at 354. See also: Adam Cygan, *National parliaments in an integrated Europe: An Anglo-German perspective* (Kluwer law international 2001) at 49-77; Adam Cygan, 'The EU Constitutional Treaty from the Perspective of the Parliament of the United Kingdom; An Improved Framework for Parliamentary Scrutiny?' in Philipp Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Europa law publishing 2006) at 19-21.

⁷⁶ Cygan, 'The EU Constitutional Treaty' at 24.

⁷⁷ House of Commons, European Scrutiny Committee, Reforming the European Scrutiny System in the House of Commons, Twenty-fourth Report of Session 2013-14, Volume I, point 22. It is the ESC proposes reasoned opinions for decision in plenary. (See page 128 of the report).

⁷⁸ Ibid, point 23.

⁷⁹ Ibid, point 28.

⁸⁰ House of Lords, The Role of National Parliaments in the European Union, 9th Report of Session 2013-14, point 30.

opinions. Nonetheless, the ESC already systematically examines EU documents.⁸¹ In this respect, the ESC receives assistance from one of its European Committees, which are highly specialized in particular areas of EU activity.⁸²

The procedure begins when the ESC receives and debates an Explanatory Memorandum (EM) from the government, and then delivers a report to the House of Commons. The report typically lists reasons for the alleged breach of the principle of subsidiarity, and includes a reasoned opinion and recommendation of a resolution to rectify such a breach. In the next step, the ESC specifies to which of the three European Committees the draft resolution should be referred.⁸³ The debate on the reasoned opinion may take place either in the European Committee or on the floor of the House.⁸⁴ At the beginning of the debate, the motion on the reasoned opinion is put forward by a minister,⁸⁵ followed by questions to the minister and a discussion of the proposal.⁸⁶ The motion agreed is referred to the House for adoption. In the last phase, the Minister must forward the motion to EU institutions regardless of the position of the government concerning the view of the ESC.

In the House of Lords, the Committee Orders of Reference regulate the scrutiny procedure.⁸⁷ Draft EU legislative acts may be challenged through a procedure initiated by the EU Committee. The Chairman of the Lords Scrutiny Committee may raise the problem of subsidiarity during general scrutiny or in advance due to the examination of the Commission

⁸¹ Reasoned opinions on subsidiarity under the Lisbon Treaty, House of Commons, Procedure Committee, Fourth Report of Session 2010-12, (London: The Stationery Office Limited), HC 1440, para 10.

⁸² The ESC can refer a motion for consideration on cases concerning European Union documents to three general European committees (A, B, C), called European Committees. Standing Order No. 119 (7).

⁸³ Standing Order No. 119 (7).

⁸⁴ If the debate has taken place on the floor of the European Committee, the question on the reasoned opinion will be put on the floor of the House without a debate. This took place with regard to the reasoned opinions on COM(2010) 371 (Investor Compensation Schemes), COM(2012) 130 (Right to Strike), COM(2013) 893 (Food from Cloned Animals).

⁸⁵ The report of the House of Commons Procedure Committee illustrates a case where a minister had to move forward with a motion even though it did not share the view of ESC, para 14. Standing Order No. 119 provides that only Ministers of the Crown may make motions, therefore motions containing the reasoned opinion, although reflecting the view of the ESC is made in the name of a Minister. One of possible solutions suggested by the report is that a motion should be in the name of the Chairs of the ESC or another member of the Committee.

⁸⁶ One of the problems indicated in Report of Session 2010-12, Procedure Committee, para 28-29 concerns time limits of a motion for a reasoned opinion, which should be debated in a European Committee or on the Floor of the House. The ESC preferred debates on the Floor of the House, as they are more time constrained. However, as it is an established principle that the European Committee discusses delegated legislation and motions relating to EU, the Procedure Committee was in favour of maintaining both possibilities.

⁸⁷ Companion to the Standing Orders and Guide to the Proceedings of the House of Lords, (The Stationery Office), para. 11.52 establishes the Scrutiny Committee. The subsidiarity scrutiny is regulated in House of Lords, Procedure Committee, 3rd Report 2009-10, para. 10-12.

annual policy strategy or the annual legislative and work programme.⁸⁸ Devolved assemblies or another national parliaments may also alert the Chairman. If the Chairman marks a draft with the label ‘subsidiarity control,’ the usual procedure may be changed.⁸⁹ As a result, the draft is fast-tracked; however it cannot be forwarded without an EM from the government. In such a case, the government may have to, if requested, submit ‘a prompt EM or part-EM dealing with the subsidiarity issue.’⁹⁰ Once forwarded to one of the seven subcommittees, a committee examines a draft act and then publishes a report on the subsidiarity violation and a resolution, which is then debated.⁹¹ Nonetheless, any Member may submit his or her own motion for a resolution containing a reasoned opinion. Furthermore, the Chairman of the Scrutiny Committee is authorised in urgent cases to present the report of a subcommittee to the House on behalf of the committee.⁹² The reasoned opinion might be debated in the Grand Committee, which can be attended by every Lord, or on the floor of the House.⁹³ The Chairman of the European Scrutiny Committee first makes a motion to ‘take a note’ of the report of the EU Committee on a EU draft legislative act, and at the end of the debate, a ‘motion to resolve’ that the EU draft legislative act at stake violates subsidiarity is agreed upon. Afterwards, an EU Liaison Officer will notify other national parliaments and maintain communication with chambers expressing a similar position. The government, supporting an act in the Council of Ministers that is the subject of a reasoned opinion, must first notify the parliament and explain its position.⁹⁴

3.2 Mixed scrutiny system

3.2.1 Domination of the EU Affairs Committee with the approval of specialized committees (French Senate)

The French legislative bodies, the Assemblée nationale (lower chamber) and the Sénat (upper chamber), have a rather weak position in the national political system, as the Constitution has

⁸⁸ House of Lords, How will the Lords EU Committee operate these new powers?, available at <http://www.parliament.uk/documents/lords-committees/eu-select/subsidiarity/use-new-powers.pdf>.

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ The EU Select Committee is assisted by seven Sub-Committees specializing in different policy areas: Economic and Financial Affairs and International Trade, Internal Market, Energy and Transport, Foreign Affairs, Defence and Development Policy, Agriculture, Fisheries and Environment, Justice and Institutions, Home Affairs, Social Policies and Consumer Protection.

⁹² House of Lords, Companion to the Standing Orders, para 10.51.

⁹³ If the debate has taken place in the Grand Committee, the reasoned opinion is then approved without a debate on the floor of the House. See for example the debate in the Grand Committee on the Fund to the Most Deprived.

⁹⁴ House of Lords, Companion to the Standing Orders, para 10.66.

transferred all of the essential competences to the executive branch.⁹⁵ Nonetheless, Article 88-4 of the Constitution guarantees participation rights of the French parliament in EU affairs by creating a committee in charge of European affairs in each of the chambers. In the Assemblée nationale and the Sénat, the Commission des affaires européennes has recently replaced the Délégation de l'Assemblée nationale pour l'Union européenne, created in 1979.⁹⁶ The recent alteration of the position of the French parliament is the consequence of the judgment of the Constitutional Council, as well as the addition of Article 88-6 concerning subsidiarity scrutiny.⁹⁷ The alteration allows both chambers to issue reasoned opinions, which the President of the chamber addresses and then forwards, and also notifies the government of such actions, to the proper EU institutions.

On the infra-constitutional level, the Rules of Procedure of the Assemblée nationale have been adjusted to accommodate subsidiarity review.⁹⁸ Article 151-9 of the Rules of Procedure of the Assemblée nationale determines that for subsidiarity tests, the procedure applicable to draft resolutions tabled as in Article 88-4 of the Constitution is applicable. First, the EU Affairs Committee is responsible for the preliminary consideration of a draft resolution.⁹⁹ Concurrently, the government participates by sending a simplified impact assessment within three weeks.¹⁰⁰ Second, the committee must table its report within fifteen days in response to a request from the government, the chairman of a standing committee or the chairman of a group.¹⁰¹ In the report, the committee proposes either the rejection or the adoption of a draft resolution with possible amendments.¹⁰² Third, the EU Affairs Committee can refer an adopted draft resolution to the relevant standing committee.¹⁰³ If within fifteen days, the

⁹⁵ Carina Sprungk, 'The French Assemblée Nationale and the German Bundestag in the European Union. Towards convergence in the 'old' Europe?' in John O'Brennan and Tapio Raunio (eds), *National parliaments within the enlarged European Union: from 'victims' of integration to competitive actors?* (Routledge 2007) at 133; Arthur Dyevre, 'The French Parliament and the European Integration' (2012) 18 *European Public Law* 527; Davor Jančić, 'The French Parliament: A European Scrutineer or National Actor?' (2013) 19 *European Public Law* 129.

⁹⁶ Act of 6 July 1979. The delegations had a statutory character, and played a sifting role, whereas the six standing committees were guaranteed by the Constitution. The creation of a committee for EU affairs was discussed already in 1990s, but did not succeed: Anais Lagelle, 'Le rôle des parlements nationaux dans le processus législatif européen à l'aune du traité de Lisbonne' [2011] *Revue française de droit constitutionnel* 25, 33; Sprungk at 140.

⁹⁷ Loi constitutionnelle n° 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve République.

⁹⁸ Résolution n° 292 du 27 mai 2009.

⁹⁹ Art 151-5, Le Règlement de l'Assemblée nationale.

¹⁰⁰ Circulaire du 21 juin 2010 relative à la participation du Parlement national au processus décisionnel européen, JORF n°0142 du 22 juin 2010 page 11232, III (la fiche d'impact simplifiée).

¹⁰¹ Art 151-5 in connection with Article 151-9-3, Le Règlement de l'Assemblée nationale.

¹⁰² As example, see the reasoned opinion of the Assemblée on the COM (2011) 169. In fact, the EU committee nominates one of its members, who prepares a report (Rapport d'information) with a draft resolution and a reasoned opinion.

¹⁰³ Art 151-6, Le Règlement de l'Assemblée nationale.

leading standing committee has not tabled a report, the text of the EU Affairs Committee shall be deemed to be adopted by the leading standing committee.¹⁰⁴ Fourth, the President of the Assembly sends a resolution containing a reasoned opinion to the EU institutions, and informs the Government about such an action.¹⁰⁵

The Rules of Procedure in the Sénat¹⁰⁶ have also been adjusted in order to accommodate subsidiarity review. Article 73 octies par. 1-8 of the Rules of Procedure, added in December 2010, provides for the participation of the Sénat.¹⁰⁷ The Constitutional Council ruled in 2011 that this provision is compatible with the Constitution.¹⁰⁸ The procedure consists of several steps. In the first step, a working group on subsidiarity, established within the EU Affairs Committee and composed of senators from all political groups, preliminarily examines the EU documents every 15 days.¹⁰⁹ Within three weeks, the government also sends a simplified impact assessment.¹¹⁰ In the second step, a senator can file a project of a reasoned opinion, always in the form of a resolution.¹¹¹ In the next step, the EU Affairs Committee adopts that resolution or a resolution on its own initiative.¹¹² Later, the committee responsible receives the transmitted resolution and rejects or adopts the proposal.¹¹³ If the relevant committee does not respond in due time, the Sénat will consider the reasoned opinion adopted,¹¹⁴ and the President of the Sénat will then immediately submit it to the EU institutions.¹¹⁵ Moreover, at any time during the procedure, the president of a group can continue with the request for review of the project in a public session.¹¹⁶ Finally, the President of the Sénat informs the government of the transmission of the reasoned opinion.

¹⁰⁴ Art 151-6, Le Règlement de l'Assemblée nationale.

¹⁰⁵ Art 151-10, Le Règlement de l'Assemblée nationale.

¹⁰⁶ Résolution du 20 décembre 2010.

¹⁰⁷ Ibid.

¹⁰⁸ Décision n° 2010-621 DC du 13 janvier 2011 (Résolution tendant à adapter le chapitre XI bis du règlement du Sénat aux stipulations du traité de Lisbonne concernant les parlements nationaux) - conformity with the constitution The reason was formal, as the Rules of Procedure of parliamentary chambers have to referred to the Constitutional Council to check their conformity with the Constitution (Art 61 of the Constitution).

¹⁰⁹ Laetitia Guilloud-Colliat, *L'action normative de l'Union européenne* (Brulyant 2014) at 280. See for example French Senate, Reasoned opinion of 14.02.2014 on COM (2013) 894 and the role of the group: <http://www.senat.fr/leg/ppr13-309.html>.

¹¹⁰ Circulaire du 21 juin 2010.

¹¹¹ Art 73 octies par. 2., Le Règlement du Sénat.

¹¹² Ibid.

¹¹³ Art 73 octies par. 3., Le Règlement du Sénat.

¹¹⁴ Art 73 octies par. 3 and par. 4. However, unlike resolutions based on article 88-4, if the standing committee does not consider the draft opinion of the Committee in Charge of European Affairs in the time limit laid down, then it is considered as adopted.

¹¹⁵ In the form prepared by the EU Affairs Committee. Art 73 octies par. 6, Le Règlement du Sénat.

¹¹⁶ Art 73 octies par. 5., Le Règlement du Sénat.

3.2.2 Domination of the EU Affairs Committee with a prior consultation of the specialized committees (Finland)

The Finnish Parliament is one of the strongest EU policy-influencers amongst Member State parliaments.¹¹⁷ In the Eduskunta (unicameral parliament), the Grand Committee, created in 1995, is the body in charge of EU Affairs.¹¹⁸ However, specialized committees also play a role by preparing reasoned opinions.

For the subsidiarity review, the Eduskunta adjusted its Rules of Procedure in 2009,¹¹⁹ with Section 30 par. 3 making the Grand Committee the receiver of documents from EU institutions. First, this committee sends EU documents to appropriate special committees, as well as the Legislative Assembly of Åland (without any previous filtering of documents that may concern only this assembly). Second, a specialized committee, or the Legislative Assembly of Åland, may, by majority decision, request that the Grand Committee examine the draft act for compliance with the principle of subsidiarity.¹²⁰ Third, the Grand Committee has the freedom to decide whether to open a dossier (also by majority decision), unless suggested by the Legislative Assembly of Åland, which entails an obligatory examination by the Grand Committee.¹²¹ Moreover, the Grand Committee requests the opinion of the government regarding an activated procedure.¹²² As a result, the Grand Committee may report the lack of a violation of the principle of subsidiarity or prepare a draft text of a reasoned opinion.¹²³ Consequently, MPs

¹¹⁷ Maurer and Wessels, 'National Parliaments after Amsterdam: From Slow Adapters to National Players?' at 462. For a comparison of Nordic countries cf. Tapio Raunio and Matti Wiberg, 'Too Little, Too Late? Comparing the engagement of Nordic Parliaments in European Union Matters' in Gavin Barrett (ed), *National Parliaments and the European Union The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press 2008) at 388; H. Hegeland, 'The European Union in national parliaments, Domestic or foreign policy? A study of Nordic parliamentary systems' in John O'Brennan and Tapio Raunio (eds), *National parliaments within the enlarged European Union: from 'victims' of integration to competitive actors?* (Routledge 2007); Tapio Raunio, 'The Finnish Eduskunta: Effective Scrutiny, Partisan Consensus' in Olaf Tans, Jit Peters and Carla M Zoethout (eds), *National parliaments and European democracy: a bottom-up approach to European constitutionalism* (Europa Law Publishing 2007).

¹¹⁸ Section 35 of the Finnish Constitution.

¹¹⁹ Reforming Law 1023/2009. Already before the entry into force of the Treaty of Lisbon, the Eduskunta was involved into processing EU documents before they were officially published by the Commission. Cf. Tapio Raunio, 'The parliament of Finland: A Model Case for Effective Scrutiny' in Andreas Maurer and Wolfgang Wessels (eds), *National Parliaments on their Ways to Europe Losers or Latecomers?* (2001) at 196.

¹²⁰ Annex to the 13th Bi-annual Report on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny: Replies of National Parliaments and the European Parliament, prepared by the COSAC Secretariat and presented to: XLIII Conference of Community and European Affairs Committees of Parliaments of the European Union, 31 May- 1 June 2012 Madrid at 135.

¹²¹ Ibid at 135.

¹²² Ibid at 136.

¹²³ Ibid at 135.

make the final decision in the plenary by means of a simple majority vote,¹²⁴ and then send the reasoned opinion and the Grand Committee report to the EU institutions.¹²⁵

3.2.3 Domination of specialised committees with a sifting role of the EU Affairs Committee (Luxembourg, Belgian House of Representatives)

The unicameral Luxembourg Chambre des Députés regulates its competences in European affairs via its Rules of Procedure. The permanent Commission on Foreign and European Affairs, Defence, Cooperation and Immigration conducts the preliminary subsidiarity examination. Thereafter, the President of the Chambre des Députés forwards the documents to specialized committees for scrutiny.¹²⁶ Four weeks after the receipt of an EU draft legislative proposal, each specialized committee decides by means of a majority vote if there is a breach of the principle of subsidiarity.¹²⁷ Each political or technical group and individual MP may present a project for a reasoned opinion.¹²⁸ If the committee confirms a violation of subsidiarity, it submits a project for a resolution to the chamber, which it adopts without a debate unless the presidium (Conférence des Présidents) decides otherwise.¹²⁹ Forgoing a public session in order to meet the eight-week deadline, the presidium decides by a majority of its members whether to send the reasoned opinion.¹³⁰ The chamber is informed about the decision during the next public session.¹³¹ Finally, the Chambre des Députés informs the government about its reasoned opinion.¹³²

Interestingly, the procedure also provides a possibility for active participation of the government in subsidiarity review.¹³³ The Chambre des Députés may demand government research assistance concerning EU draft legislative acts and compatibility with the principle of subsidiarity.

The Chambre des Députés is a ‘low profile’ parliament, due to its limited number of MPs, limited capacities, limited role throughout Luxembourgish history and lack of in-depth

¹²⁴ Section 30, par. 4 of Rules of Procedure.

¹²⁵ Even if the Eduskunta does not find a breach, the report is sent due to informative grounds.

¹²⁶ Art 169 (4), Règlement de Chambre des Députés.

¹²⁷ Art 169 (5) par 1, Règlement Chambre des Députés.

¹²⁸ Art 169 (5) par 2, Règlement Chambre des Députés.

¹²⁹ Art 169 (5) par 3, Règlement Chambre des Députés.

¹³⁰ Art 169 (5) par 4, Règlement Chambre des Députés.

¹³¹ Art 169 (5), Règlement Chambre des Députés.

¹³² Annexe 2, part II point 7 to Règlement Chambre des Députés (Aide-Mémoire sur la coopération entre la Chambre des Députés et le Gouvernement du Grand-Duché de Luxembourg en matière de politique européenne).

¹³³ Annexe 2, part III point 3.

knowledge of European affairs of parliamentarians.¹³⁴ It is thus surprising how active the chamber is with regard to the application of subsidiarity review. Detailed codification of the subsidiarity scrutiny procedure also seems atypical for this Member State, as Luxembourg has in general a ‘highly informal’ scrutiny procedure with a ‘very low degree of institutionalization’ when compared with other Member States.¹³⁵

The Belgian Chambre des Représentants’ mechanism of subsidiarity scrutiny is also mixed, with a sifting role accorded to the Federal Advisory Committee on European Affairs.¹³⁶ The Belgian Chambre des Représentants has a procedure that starts with a review of draft legislative acts by the secretariat of the Federal Advisory Committee on European Affairs.¹³⁷ The chairman of the Chambre des Représentants or one-third of the members of a specialized committee may request a report regarding the subsidiarity and proportionality of a Commission proposal. The secretariat of the Federal Advisory Committee on European Affairs may also prepare such report upon its own initiative.¹³⁸ These reports are both sent to the specialized committees, as well as to the Federal Advisory Committee on European Affairs,¹³⁹ and a member of any of these committees may request to put the report on the committee’s agenda.¹⁴⁰ On the basis of a demand of one-third of members of a specialized committee, it may designate a *europromoteur*, who will draft a project for the reasoned opinion.¹⁴¹ If a specialized committee adopts a draft resolution (subsidiarity opinion) outlining a subsidiarity violation, it is considered as the resolution of the chamber. Otherwise, if one third of the members of the specialized committee find it necessary, the draft resolution is forwarded to the plenary.¹⁴² After adoption, the subsidiary opinion is sent to the European Commission and the Belgian government.

¹³⁴ Danielle Bossaert, ‘The Luxembourg Chamber of Deputies: From a Toothless Tiger to a Critical Watchdog?’ in Andreas Maurer and Wolfgang Wessels (eds), *National Parliaments on their Ways to Europe Losers or Latecomers?* (2001) at 302.

¹³⁵ Ibid at 303.

¹³⁶ The Committee consist of three delegations: from both the Chambre des Représentants, Sénat and the Belgian MEPs.

¹³⁷ Art 37bis (1), Règlement Chambre des Représentants. Cf. Tom Delreux and François Randour, *The Belgian Parliament and EU affairs* (OPAL Country Reports, 2012) at 5.

¹³⁸ Art 37bis (1), Règlement Chambre des Représentants. Cf. Ibid.

¹³⁹ Art 37bis (2), Règlement Chambre des Représentants.

¹⁴⁰ Art 37bis (3), Règlement Chambre des Représentants.

¹⁴¹ Art 37bis (4), Règlement Chambre des Représentants.

¹⁴² Art 37bis (5), Règlement Chambre des Représentants.

3.2.4 Domination of specialised committees with final approval by the EU Affairs Committee (Germany)

In Germany, the Bundestag (directly elected chamber) and the Bundesrat (federal council representing the Länder) fulfil the legislative functions at the federal level. Both of these chambers are active in the European decision-making process. Since the Treaty of Maastricht, when Germany added Article 23 (the ‘Europa-Artikel’) to the Basic Law, there has been a regulated participation of the Bundestag in EU Affairs. Furthermore, Article 45 of the Basic Law provided for the establishment of a permanent committee in the Bundestag known as the EU Affairs Committee. Finally, the constitutional reform added Articles 50 and 52 in the Basic Law concerning the participation of the Länder in EU affairs and the creation of the Europakammer in the Bundesrat.¹⁴³ At the infra-constitutional level, Germany introduced two laws at the time of the Treaty of Maastricht, concretizing cooperation between the federal government and the Bundestag (EUZBBG)¹⁴⁴ and between the federal state and the Länder (EUZBLG).¹⁴⁵

The essential increase of the powers of national parliaments at the EU level due to the Treaty of Lisbon motivated further amendments at both constitutional and infra-constitutional levels. The Federal Constitutional Court declared the legislation that was initially introduced as unconstitutional. As a consequence, new laws regulating the participation of the Bundestag and the Bundesrat came into force.¹⁴⁶ The Basic Law, however, does not refer to the *ex ante* subsidiarity, in contrast to the subsidiarity action (Article 23 para. 1a of the Basic Law).¹⁴⁷

Currently, the Rules of Procedure as indicated by the new Responsibility for Integration Act (Integrationsverantwortungsgesetz, hereafter IntVG)¹⁴⁸ and the amended EUZBBG¹⁴⁹ play

¹⁴³ Gesetz zur Änderung des Grundgesetzes v. 21.12.1992, BGBl. 1992 I, p. 2086 ff.

¹⁴⁴ Gesetz vom 12.03.1993, BGBl. 1993 I, p. 311, changed by Article 2.1. of Gesetz vom 17. November 2005 (BGBl. 2005 I, p. 3178). (EUZBBG)

¹⁴⁵ Gesetz vom 12.03. 1993, BGBl. 1993 I, p. 313. (EUZBLG).

¹⁴⁶ Integrationsverantwortungsgesetz (BGBl. 2009 I, p. 3022), Gesetz zur Umsetzung der Grundgesetzänderungen für die Ratifizierung des Vertrags von Lissabon (BGBl. 2009 I, p. 3822), Gesetz zur Änderung des EUZBBG (BGBl. 2009 I, p. 3026) and Gesetz zur Änderung des EUZBLG (BGBl. 2009 I, p. 3031).

¹⁴⁷ This, according to Calliess and Beichelt, puts too much weight on the ex-post scrutiny, ‘without giving due consideration to the political potential of a subsidiarity complaint.’ See Calliess and Beichelt at 13.

¹⁴⁸ § 11 (1) IntVG.

¹⁴⁹ However, for the purpose of the subsidiarity review, the IntVG bases itself on the Ausweitungsgesetz 2008, only ‘editorial changes’ were introduced, Cf. Christian Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon: ein Überblick über die Reformen unter Berücksichtigung ihrer Implikationen für das deutsche Recht* (Mohr Siebeck 2010) at 285. For a critical assessment of the transposition of the Lisbon judgment into law, cf. M. Nettesheim, *Die Integrationsverantwortung*. Moreover, according to some authors, the procedure could have been improved if in the same way as for the action to CJEU the threshold for the reasoned opinion would construct a minority vote, cf. Ingolf Pernice and Steffen Hindelang, ‘Potenziale europäischer Politik nach

the most important role vis-à-vis the subsidiarity review in the Bundestag. The EU Affairs Committee of the Bundestag is a so-called ‘cross-section committee,’ since scrutiny is divided among specialized committees with a possibility to consult the EU Affairs Committee, which then expresses the final position to the government.¹⁵⁰ After the Bundestag receives EU draft legislative acts from EU institutions, the government is obliged to forward a comprehensive appraisal of the competence of the EU to issue an act and compatibility with the principles of subsidiarity and proportionality to the committees within two weeks or before the start of Council negotiations.¹⁵¹ Specialized committees then scrutinize EU draft legislative acts by taking into account the compatibility with the principle of subsidiarity and proportionality.¹⁵² If the specialized committee finds a violation, it may prepare a document stressing its opinion and recommendation of a resolution.¹⁵³ Immediately on being informed, the EU Affairs Committee can also take a position.¹⁵⁴ In the meantime, other committees may, within a limited period, complete or prepare a new position. The whole chamber will only be informed if the EU Affairs Committee finds a subsidiarity violation, regardless of whether a specialized committee does so or does not.¹⁵⁵ The Rules of Procedure allow a general eight-week period provided in the Protocol No. 2 to conduct scrutiny.¹⁵⁶ The Bundestag or the EU Affairs Committee takes the final decision, if authorized by the Bundestag.¹⁵⁷ The President of the Bundestag then transmits the reasoned opinion to the relevant EU institutions.¹⁵⁸

Accordingly, the rights of the Bundesrat in the EU decision-making process, nowadays anchored in Article 23 (2) of Basic Law, are gradually expanding.¹⁵⁹ This provision states that the Länder participate in matters concerning the EU through the Bundesrat. Moreover, according to Article 23 (4), the Bundesrat takes part in the decision-making process to the same extent as with a comparable domestic matter, or if the subject falls within the domestic competences of the Länder. According to §11 (1) IntVG, the Bundesrat may set rules

Lissabon - Europapolitische Perspektiven für Deutschland, seine Institutionen, seine Wirtschaft und seine Bürger’ [2010] Europäische Zeitschrift für Wirtschaftsrecht 407, 408.

¹⁵⁰ Article 45 S.2 Basic Law. Cf. Calliess, *Die neue Europäische Union nach dem Vertrag von Lissabon: ein Überblick über die Reformen unter Berücksichtigung ihrer Implikationen für das deutsche Recht* at 223.

¹⁵¹ §13 (6) IntVG, § 7 (2) EUZBBG.

¹⁵² §93a (1) Rules of Procedure.

¹⁵³ §93a (2) Rules of Procedure.

¹⁵⁴ §93a (1) Rules of Procedure.

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*

¹⁵⁷ §93c Rules of Procedure.

¹⁵⁸ §11 IntVG.

¹⁵⁹ Patrick Melin, ‘Die Rolle der deutschen Bundesländer im Europäischen Rechtsetzungsverfahren nach Lissabon’ (2011) 5 Zeitschrift Europarecht 655, 656.

regarding subsidiarity review in its Rules of Procedures. However, there are no recent developments in that respect, indicating that the general rules for scrutinizing EU documents apply.¹⁶⁰ Nonetheless, the Bundesrat critically scrutinized EU drafts, taking into account subsidiarity violations, before the entry into force of the Lisbon Treaty.¹⁶¹

The procedure in the Bundesrat is thus as follows: the President of the Bundesrat decides which documents will be reviewed according to the principle of subsidiarity, or a Land may request that scrutiny takes place.¹⁶² Next, specialized committees receive EU draft legislative acts. The EU Affairs Committee also deliberates on the documents sent by EU institutions, but bases its expertise on the opinions forwarded by the specialized committees. The EU Affairs Committee issues a report and submits it to the plenary, recommending a resolution.¹⁶³ At the last stage, committee members present the said report to the plenary with a recommendation for a resolution.¹⁶⁴ Due to the infrequent meetings of the Committee (once or twice per month only) and the plenary sessions (once per month), the European Chamber (Europakammer) of the Bundesrat, as established in Article 52 (3a) Basic Law, may play an important role in accelerating the subsidiarity review.¹⁶⁵ The members of the Europakammer can gather within a week upon notice from the President of the Bundesrat.

3.3 Decentralized scrutiny (the Netherlands, Eerste Kamer; Belgian Sénat)

The Dutch parliament consists of two chambers: the Tweede Kamer (lower) and the Eerste Kamer (upper). Both of these chambers have EU Affairs Committees, respectively created in 1986 and 1970,¹⁶⁶ which currently go by the official names of the Standing Committee on European Affairs in the Tweede Kamer¹⁶⁷ and Standing Committee on European Cooperation Organisations in the Eerste Kamer. However, the latter does not participate in subsidiarity

¹⁶⁰ Ibid at 668.

¹⁶¹ Christine Mellein, 'Die Rolle von Bundestag und Bundesrat in der Europäischen Union' [2011] Zeitschrift Europarecht-Beiheft 13, 56.

¹⁶² IV a., § 45 a (1) Rules of Procedure of Bundesrat.

¹⁶³ Gracia Vara Arribas and Delphine Bourdin, *The Role of Regional Parliaments in the Process of Subsidiarity Analysis within the Early Warning System of the Lisbon Treaty* (2011), 45.

¹⁶⁴ Ibid at 46.

¹⁶⁵ Mellein at 58.

¹⁶⁶ Ben J.S. Hoetjes, 'The Parliament of the Netherlands and the European Union: Early Starter, Slow Mover' in Andreas Maurer and Wolfgang Wessels (eds), *National Parliaments on their Ways to Europe Losers or Latecomers?* (2001) at 347.

¹⁶⁷ This Committee relies on the expertise and knowledge of the specialized committees. There are specialized MPs who deal with EU issues in certain policies, however they lack the general knowledge on EU affairs, as the Standing Committee on European Affairs rarely meets as a single committee, cf. Ronald Holzhaacker, 'Parliamentary Scrutiny over European Union Decision-Making in the Netherlands' in Gavin Barrett (ed), *National Parliaments and the European Union The Constitutional Challenge for the Oireachtas and Other Member State Legislatures* (Clarus Press 2008) at 428.

review, as only the specialized committees conduct scrutiny. Hence, only the proceedings in the Eerste Kamer will be presented herein.

The European Affairs Committee of the Eerste Kamer adopted a new working method in 2009 coordinating scrutiny. Consequently, various standing committees can select documents for scrutiny on the basis of the Commission's annual programme, instead of waiting for governmental fiches.¹⁶⁸ In the Eerste Kamer, the subsidiarity scrutiny procedure for handling EU proposals is anchored in the letter to the government from 2010 and based on the primary involvement of all the specialized committees.¹⁶⁹ Each committee selects proposals from the annual legislative programme of the Commission or through the weekly overview of newly published European proposals presented by Eerste Kamer staff.¹⁷⁰ Afterwards, proposals are placed on the annual European Work Programme of the Eerste Kamer, and divided according to policy fields.

MPs in the Netherlands scrutinize EU draft legislative acts in a manner similar to national bills.¹⁷¹ If a committee has classified a European proposal as a priority (included in the European Work Programme) it is automatically put on the committee agenda for discussion. A proposal selected by a member from the weekly overview of proposals is put on the agenda by request. The committee may also decide to not consider an initially chosen proposal, instead deciding to only 'take note' thereof.¹⁷² Prior to any discussion, the committee determines if there are any subsidiarity issues, and if a reasoned opinion shall be prepared. In such a case, the committee convenes a meeting for the submission of comments. Moreover, committees in the Eerste Kamer may simultaneously consult the Dutch government about a draft legislative act and decide if they will rely on the government in the pursuit of a subsidiarity breach.¹⁷³ Finally, the committee approves a reasoned opinion in a plenary session. Chambers may cooperate, as the reasoned opinion may be sent in the name of both the Tweede and Eerste Kameren.

¹⁶⁸ Fiche contains governmental opinion on an official proposal of the Commission, whereas the EU draft legislative proposals that undergo the subsidiarity control have no fiche as it is an early phase, cf. Leonard FM Besselink and Brecht van Mourik, 'The Parliamentary Legitimacy of the European Union: The Role of the States General within the European Union' (2012) 8 Utrecht Law Review 28, 34 & 46.

¹⁶⁹ Brief Aan de Minister-President, from 5.01.2010, available at: http://www.eerstekamer.nl/eu/behandeling/20100105/brief_van_de_voorzitter_van_de/f=/vicrg385m2cr.pdf, p. 1.

¹⁷⁰ Brief, p. 4. The description of the procedure is expressed in a memorandum, available at: http://www.eerstekamer.nl/eu/begrip/english_3#p7

¹⁷¹ Brief, p.5.

¹⁷² «voor kennisgeving wordt aangenomen», Brief, p. 5.

¹⁷³ Brief, p. 6.

A similar decentralized scrutiny takes place in the Belgian Sénat.¹⁷⁴ The Secretariat of the Senate delegation to the Federal Advisory Committee on European Affairs receives all of the draft legislation from the Commission. Selected documents are then sent to the selected specialized committees, without any specific report on subsidiarity.¹⁷⁵ Any senator from such a committee may request a discussion of a Commission proposal. If a reasoned opinion is issued, it is next discussed in the plenary. If the plenary approves the reasoned opinion, it is sent to the secretariat of the Federal Advisory Committee on European Affairs, which forwards it to the European Commission.

3.4 Subsidiarity-focused scrutiny

Subsidiarity-focused scrutiny differs from other categories, as this type of scrutiny aims at establishing a single committee exclusively focused only on the assessment of the principle of subsidiarity. Accordingly, the Netherlands has only once created such a committee, which may suggest that concentrating subsidiarity scrutiny in a single institution is not effective. The functions of the Dutch Joint Committee on the Application of Subsidiarity will be presented in this section to underline the drawbacks of this type of scrutiny system.

As early as 2003, a Joint Committee on the Application of Subsidiarity, renamed the Temporary Joint Committee for Subsidiarity Review in 2006, was established in the Dutch parliament, arousing parliamentary interest in the European decision-making process.¹⁷⁶ The aim of the Joint Committee was to accelerate the system of scrutiny, to have more influence on European decision-making. The Joint Committee was supposed to forward proposals among sectoral committees, to which then had three weeks to respond. On this basis, the Joint Committee advised both chambers on how to vote.¹⁷⁷ Thus, the specialized committees assessed subsidiarity, while the Joint Committee functioned as a coordinator.

In 2009, the Netherlands again established a Joint Committee composed of members from both chambers. Nonetheless, such a constellation raised concerns about the primacy of the Tweede Kamer, which is arguably more important in terms of power and political influence.¹⁷⁸ Again, the procedure was identical to the previous committee.¹⁷⁹ Unexpectedly,

¹⁷⁴ Based on information from the COSAC, 16th Bi-annual Report on EU Practices and Procedures (October 2011).

¹⁷⁵ Delreux and Randour at 5.

¹⁷⁶ Olaf Tans, 'The Dutch Parliament and the European Constitution. How Yes led to No' in Philipp Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Europa law publishing 2006) at 88.

¹⁷⁷ An outcome of the procedure within a COSAC experiment were different opinions within sectoral committees: Tans, 'The Dutch Parliament and the EU: Constitutional Analysis' at 176.

¹⁷⁸ Besselink and van Mourik at 31 & 34.

however, the Eerste Kamer assessed the work of the committee negatively due to work delays.¹⁸⁰ Afterwards, the Tweede Kamer created its own Subsidiarity Committee, but this was not reestablished after elections in 2010.¹⁸¹

3.5 Regional Parliaments

The adjustments of the regional parliaments with legislative powers are assessed in the following section. There are 75 regional parliaments with legislative powers in eight EU Member States.¹⁸² They may participate in the EWS in two ways: through their national parliaments or through the Subsidiarity Monitoring Network of the Council of Regions.¹⁸³ Examples of procedures adopted for subsidiarity scrutiny in the chosen federal, regionalised and devolved regional parliaments are presented below.

Looking at the specific provisions, in federal Germany, the Basic Law does not provide for the direct participation of regional parliaments in EU affairs, including subsidiarity review.¹⁸⁴ German regional parliaments may participate only through their governmental representatives in the Bundesrat (Article 23.2 Basic Law). Thus, Länder's power concerning subsidiarity scrutiny depends on relations with the regional executive power.¹⁸⁵ There have thus been divergent types of adjustments of regional parliaments to the EWS; some State constitutions were revised (Baden-Württemberg, Bremen), while elsewhere, the rules of procedure were amended (Brandenburg). Besides this, some Länder parliaments concluded agreements with their respective governments with regard to receiving EU draft legislative acts.¹⁸⁶ In some Länder, the executive briefs the parliament on EU drafts that are important for the Land.¹⁸⁷ Moreover, in some cases, the regional government provides any technical support necessary for the subsidiarity scrutiny, for example by filtering out relevant proposals.¹⁸⁸ The procedures also differ in respect of the committee that takes the decision, and concerning the

¹⁷⁹ Tans, 'The Dutch Parliament and the EU: Constitutional Analysis' at 176.

¹⁸⁰ Probably because unbalance of work between both chambers, as most of the work was done by the Eerste Kamer, cf. Besselink and van Mourik at 35.

¹⁸¹ Ibid.

¹⁸² Committee of the Regions, *The Subsidiarity Early Warning System of the Lisbon Treaty – the role of regional parliaments with legislative powers and other subnational authorities* (2013) at 9.

¹⁸³ Karolina Borońska-Hryniewiecka, 'Regions and subsidiarity after the Treaty of Lisbon: overcoming the 'regional blindness'' in Marta Cartabia, Nicola Lupo and Andrea Simoncini (eds), *Democracy and subsidiarity in the EU* (Il Mulino 2013).

¹⁸⁴ Delgado del Saz at 30.

¹⁸⁵ Vara Arribas and Bourdin at 48-49.

¹⁸⁶ Committee of the Regions, *The Subsidiarity Early Warning System of the Lisbon Treaty* at 52.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid at 53.

involvement of the plenary.¹⁸⁹ In addition, the Bavarian parliament sends its opinions directly to the EU Commission.¹⁹⁰ In case of the Baden-Württemberg parliament, the opinion of the parliament is binding for the regional government.¹⁹¹

In regionalized Spain, Article 6 of Ley 24/2009 requires the national parliament to transmit any EU draft legislative act to one of the 17 regional parliaments without prejudging the existence of a regional competence for a matter.¹⁹² From the moment of the receipt of the draft legislative act from Cortes Generales, regional parliaments have four weeks to submit an opinion.¹⁹³ However, the Joint Committee is not obliged to discuss an opinion of a regional parliament after this period has elapsed.¹⁹⁴ Nonetheless, a reasoned opinion submitted in due time shall be incorporated to the reasoned opinion of the national parliament, if the Cortes Generales decides to issue one.¹⁹⁵ Neither ‘convincingly represented in Senado,’ due to its composition, nor possessing essential powers in subsidiarity review through the national law, the position of the regions in the Early Warning System is very limited.¹⁹⁶

Finally, in asymmetrically regionalized states such as Finland, where the Åland Islands have an autonomous status, parliament is eligible to participate in subsidiarity review. All the EU draft legislative proposals are sent to the Åland Parliament and the Autonomy Committee takes the decision whether an opinion on subsidiarity is necessary.¹⁹⁷ However, the Eduskunta should receive any opinion, which is not binding, from the Åland Legislative Assembly within six weeks.¹⁹⁸ In addition, a reasoned opinion of the Åland Islands is an obligatory incentive for the Eduskunta to start subsidiarity review at the national level.¹⁹⁹

¹⁸⁹ Ibid at 54.

¹⁹⁰ Ibid at 51.

¹⁹¹ Ibid at 55.

¹⁹² Also in Resolución, Octavo, para 3.

¹⁹³ Ley 24/2009, Art 6 para 2. For example the Parliament of Catalonia’s Organic Law 6/2006 of the 19th July, on the Reform of the Statute of Autonomy of Catalonia provides participation of the parliament in the subsidiarity in very general terms. It will scrutinize the principle of subsidiarity and proportionality if the EU draft legislative act affects powers of the Generalitat (Article 188). For details on Catalanian participation in the subsidiarity review cf. Miquel Palomares Amat, ‘La participación del Parlamento de Cataluña en la aplicación y el control del principio de subsidiariedad’ (2011) 15 Revista de Derecho Comunitario Europeo 19.

¹⁹⁴ Vara Arribas and Bourdin at 77.

¹⁹⁵ Ley 24/2009, Art 6 para 3 and Resolución, octavo, para 3.

¹⁹⁶ Thomas Alexander Vandamme, ‘From Federated Federalism to Harmonized Federalism? The Case of EU Subsidiarity Scrutiny in Spain and Belgium’ [2011] Amsterdam Law School Research Paper at 22.

¹⁹⁷ Committee of the Regions, *The Subsidiarity Early Warning System of the Lisbon Treaty* at 44.

¹⁹⁸ Vara Arribas and Bourdin at 100.

¹⁹⁹ Annex to the Thirteenth Bi-annual Report on Developments, p. 135.

Furthermore, the three devolved UK legislative bodies (Scottish Parliament,²⁰⁰ National Assembly for Wales²⁰¹ and the Northern Ireland Assembly) participate in subsidiarity review in the United Kingdom. These parliaments may issue their own reasoned opinion, but neither of the Houses is bound by their requests.²⁰² The House of Commons, however, can ask devolved legislatures to comment on its own reasoned opinions, and it may take into account the opinions of these legislatures in its own scrutiny.²⁰³ In the assemblies of the Northern Ireland and of Wales, a committee in charge of, *inter alia*, subsidiarity review was established.²⁰⁴ Further, only the Scottish Parliament and the Welsh National Assembly introduced subsidiarity review procedures.²⁰⁵

The examples reveal that the roles of regional parliaments are all similar, insofar as their opinions are not directly binding on the national parliaments. Nevertheless, regional recommendations may incentivize the closer examination of some of the EU draft legislative acts. Finland has the strongest regional parliament of the examples provided in this chapter, because a reasoned opinion causes a ‘snow-ball-effect’ and obliges the Eduskunta to pursue subsidiarity review. The lack of a vote in the ‘yellow’ or ‘orange card’ procedure characterises the weak role of regional parliaments in Germany, Spain, Finland and the UK.²⁰⁶ This raises questions concerning the added value of the participation of regional parliaments in subsidiarity review. First, regional parliaments might be burdened by all the EU draft legislative acts on which they have to elaborate. Second, national parliaments may still have additional work to consider even if not bound by the reasoned opinion of a regional parliament.

²⁰⁰ On the discussion concerning the subsidiarity scrutiny in Scotland under the Constitutional Treaty cf. Gordon Heggie, ‘The Scottish Parliament and the EU Constitution; Moving Beyond the Principle of Partnership?’ in Philipp Kiiver (ed), *National and Regional Parliaments in the European Constitutional Order* (Europa law publishing 2006).

²⁰¹ European and External Affairs Committee, Discussion paper: Implications for the National Assembly for Wales of the Protocol on Subsidiarity and Proportionality (Protocol No.2) contained in the Lisbon Treaty, EUR(3)-03-10: Paper 2: 12 January 2010, available at: <http://www.cynulliadcymru.org/en/bus-home/bus-committees/bus-committees-previous-committees/bus-committees-second-eur-home/bus-committees-second-eur-agendas.htm?act=dis&id=165407&ds=2/2010>.

²⁰² Committee of the Regions, *The Subsidiarity Early Warning System of the Lisbon Treaty* at 95.

²⁰³ Ibid at 98.

²⁰⁴ Ibid at 95.

²⁰⁵ Ibid.

²⁰⁶ On the contrary, in Belgium for the legislative proposals that deal with ‘mixed-affairs’, the votes in the EWS are divided between the federal and regional parliament. Even one regional parliament stating a subsidiarity breach by the EU draft legislative act may take one of the two votes assigned to the Belgian parliament. Where the EU draft legislative act encroaches on the exclusive regional competence the regional parliaments have both of the votes. From five regional parliaments it is enough, if two of them find a subsidiarity breach. However, these votes need to come from different language administrations. Cf. Patricia Popelier and Werner Vandenbruwaene, ‘The Subsidiarity Mechanism as a Tool for Inter-Level Dialogue in Belgium: On ‘Regional Blindness’ and Cooperative Flaws’ (2011) 7 *European Constitutional Law Review* 204, 222.

4 Comparison of procedures

In the following section, I will study the types of scrutiny indicated in the previous section, taking into account the following variables: the detection of the breach; the initiative to draft a reasoned opinion; the function of the government, and the role of the plenary. Subsidiarity review is a relatively new competence of national parliaments, and this is reflected in the variety of approaches taken across these dimensions.

4.1 The initial detection of subsidiarity breaches

The first element of procedure I will consider is the question as to whether there is an *a priori* examination process, or whether the detection of breaches is largely random. The national parliament scrutiny systems explored in this chapter reveal that different possibilities for identifying problematic draft legislative acts are in use. These can be roughly grouped into ‘*ex ante*’ and ‘ongoing’ sections.

Some parliaments detect subsidiarity violations *ex ante* through an analysis of the annual legislative programme of the Commission. On this basis the annual European Work Programme of the Dutch Eerste Kamer presents a list of potentially problematic proposals that acts as an *ex ante* device to help focus work.

By contrast, the identification of potentially controversial acts in parliament is also possible on an ongoing basis. Many national legislative bodies, such as the Polish chambers, the Finnish Eduskunta, the Belgian Sénat and the Luxembourg Chambre des Députés pursue this approach with continuous and ongoing oversight of received draft legislative acts. For example, the UK House of Lords’ Chairman of the EU Committee examines all EU documents on a weekly basis to identify which of them demand further scrutiny.²⁰⁷ Spain is similar, insofar as the parliament’s legal service sends a list to the Joint Committee for the EU which includes, *inter alia*, EU legislative proposals that may create problems from the point of view of subsidiarity, as well as those against which the subsidiarity action could be brought.²⁰⁸

When utilizing the latter approach for the identification of subsidiarity violations, problems in Commission proposals may come as a surprise to national parliaments. Thus, the analysis of the annual legislative programme of the Commission by parliaments may be more advantageous than relying only on the ongoing scrutiny of EU draft legislative acts.

²⁰⁷ House of Lords, European Union Committee, 9th Report of Session 2013-14, point 33.

²⁰⁸ Piedrafita at 15.

Moreover, the ‘early warning’ *ex ante* approach may help to ensure that parliaments have sufficient time to submit a fully developed reasoned opinion within the eight-week period allotted. Nevertheless, the significance of the annual legislative programme of the Commission should not be exaggerated, since the proposed initiatives often have a very broad character at that stage, and it may be difficult to assess compatibility with the principle of subsidiarity on the basis of the programme itself. If engaged at this stage, national parliaments may tend to challenge the idea of the proposal itself, rather than acting according to the vision of national parliament participation in the EU decision-making process.

4.2 The initiative to draft a reasoned opinion

The next component of parliamentary procedures I consider concerns the right to take the initiative to draft a reasoned opinion. This is a particularly important issue within the implementation of the EWS, since limitations in a chamber’s right to take the initiative may constrain the effectiveness of subsidiarity scrutiny. Likewise, excessive freedom given to parliaments to issue reasoned opinions may hinder the work of a parliament by crowding out discussion of other vital aspects of EU affairs.

We observe a variety of possible hurdles for taking the initiative for a reasoned opinion in the practices of the different Member States: some national legal systems confer the initiative rights to a single MP (House of Lords, French Sénat, Belgian Sénat), others a group of MPs (fifteen MPs for the Polish Sejm), a Committee (Polish Sejm, French Assemblée, Finland), the Chairman of a Committee (French Assemblée) or a political group (Luxembourg), the chairman of a political party (French Assemblée) or a number of political parties (Spain). Moreover, this implies that a group representing a minority in a chamber may enjoy the initiative right – having one fifth of the seats is sufficient in Spain.

Despite the discrepancies regarding the details of these rules, some parallels between them are visible. The initiators tend to be a relatively small group, which allows coordination and increases the possibility that reasoned opinions will be prepared on time, relative to having to coordinate across a larger share of the chamber. Nonetheless, an even better result may be achieved when an expert prepares a reasoned opinion (as is the case in the Tweede Kamer or in the Belgian lower chamber, where one-third of members of a specialized committee may designate a *europromoteur*, who will draft a project of the reasoned opinion). Indeed, it can be argued that the most important aspect of a reasoned opinion is that it be of high quality

and subsidiarity-oriented drafting, given the Commission's dismissive attitude towards non-subsidiarity arguments.

4.3 The role of the government in subsidiarity review

Regarding the degree of involvement of the government, at one end of the spectrum, some subsidiarity scrutiny systems rely heavily on the government. For example, both British chambers receive explanatory memoranda from the government for all EU documents that it receives from the Commission. Other parliamentary chambers likewise receive the opinion of the government on any EU draft legislative act, thanks to recent reforms, as is the case in Poland²⁰⁹ and in Germany (Bundestag).²¹⁰ In both the Polish and British cases, the government has fourteen days after the receipt of a draft legislative act or until the start of Council negotiations (in the case of Germany) to deliver an opinion. In Finland, a government opinion will be requested as a matter of course. At the other end of the spectrum are systems where the government is less involved: neither the French nor the Dutch systems require the government to issue an opinion. However, in France, the Prime Minister in a recent *circulaire* committed the government to submitting a simplified impact assessment within three weeks of the transmission of any draft proposal. Intermediate approaches include a possibility for national parliaments to request an opinion of the government (Spain)²¹¹ or assistance from the government to assist in the chamber's efforts to assess a possible violation of subsidiarity (Luxembourg).

The obligation of governmental participation at an early stage may be somewhat surprising as it runs counter to the fact that subsidiarity review is a competence specifically created for national parliaments. In addition, governments already dispose of a possibility to state their views on the principle of subsidiarity through participation in the discussions on draft EU acts in the Council. On the other hand, there are two reasons (one practical and one political) in favour of governmental opinions. First, the executive body may possess greater research resources, in particular when parliaments are small such as the Luxembourg *Chambre des Députés*. Second, an early signal of a subsidiarity breach by the government may provide an incentive for weak EU Affairs scrutinizers to examine a proposal more closely.

²⁰⁹ Art 9 of 2004 Cooperation Act did not indicate that government's opinions should assess the compatibility with the principle of subsidiarity.

²¹⁰ §13 (6) IntVG, § 7 (2) EUZBBG comprehensive appraisal (umfassende Bewertung).

²¹¹ Art 3 j), Ley 24/2009.

4.4 The role of the plenary

The analysis of Member States' regulations implies two different attitudes towards the involvement of an entire parliamentary chamber in subsidiarity scrutiny: the plenary session may have a *facultative* or an *obligatory* character. The former approach in which the regulations leave the point and degree of involvement of the plenary relatively unspecified is adopted in the Spanish chambers.²¹² Similarly, an early draft of reasoned opinions may be reviewed in public session at any time during the scrutiny process in the French Sénat. In contrast, participation of the plenary is compulsory in the UK House of Lords and the House of Commons and in the Belgian Sénat, as well as in both Dutch chambers concerning motions for the adoption of reasoned opinions. By the same token, the Finnish Eduskunta and German Bundestag (or the EU Affairs Committee with the prior authorization by the plenary) must decide upon the issuing of reasoned opinions in plenary session. The Luxembourgish chamber can adopt a draft of a resolution without debate, similar to the Belgian Chambre des Représentants.²¹³ It may also happen, however, that national provisions do not provide for a plenary session for subsidiarity at all, as is the case, for example, in the Polish Sejm and the French Assemblée nationale. Nonetheless, debates still take place under general parliamentary rules for taking resolutions.

The plenary plays an important role concerning the subjects eligible for reasoned opinions. Article 6 of Protocol No. 2 states that 'any national Parliament or any chamber of a national Parliament' may forward a reasoned opinion. Thus, it is disputable if a reasoned opinion forwarded by a committee without being voted on in plenary session may even be valid. However, some parliamentary committees possess the authority conferred by parliament to represent parliament in external functions, including issuing reasoned opinions. This approach is adopted in Germany, where the Bundestag always votes on a reasoned opinion except when it previously authorizes the EU Affairs Committee in this regard.

Plenary sessions on subsidiarity and reasoned opinions have positive and negative features. On the one hand, plenary discussion of subsidiarity issues raises and demonstrates the awareness of MPs of current EU affairs. On the other hand, the involvement of the entire chamber, especially if the plenary session includes a debate, creates additional demands on

²¹² Art 5.2., Ley 24/2009.

²¹³ For the Belgian case, a plenary vote is triggered if one-third of the committee requests it.

time and may paralyze a parliament's work.²¹⁴ National parliaments often criticize the strict eight-week rule, but do not reduce obstacles to the timely submission of reasoned opinions. In addition, as underlined by a British MP, discussing subsidiarity in committee rather than in the plenary, allows 'go[ing] into considerable detail, which has been highly advantageous for an understanding of all the issues that have come up.'²¹⁵

In sum, each of the different systems mentioned has its advantages and disadvantages. Kiiver, in his study of the different approaches of Member States in parliamentary scrutiny of EU affairs, makes a number of valid points, which also apply with regard to the specificities of the subsidiarity review mechanism.²¹⁶ The main benefit of a centralized scrutiny system is the 'efficiency of the deliberation process,' EU-related expertise, confidentiality and promptitude.²¹⁷ Conversely, specialized committees, even when lacking profound knowledge of EU affairs, may competently contribute in their specific policy areas, such as agriculture or the environment. Nonetheless, there can be an evident level of disregard of European documents by MPs in the decentralized scrutiny system.²¹⁸ A mixed system may be the most appropriate form to connect the expertise of general EU Affairs Committees and specialized committees. However, the issue of time requirements and the possibilities of conflict between different committees represent two significant drawbacks of the mixed system. One solution may be to confer scrutiny power to a EU Affairs Committee within which EU subcommittees focus on specific policies.

Overall, from a theoretical perspective, it is unclear which approach may perform best. In the following section, I will therefore examine the impact of the different scrutiny models on the actual participation in the subsidiarity review procedure by national parliaments.

5 The impact of the *ex ante* subsidiarity review design on the number of reasoned opinions

In the following section, I will analyse the reports of the Commission concerning the application of the principle of subsidiarity. These reports provide a thorough survey of the

²¹⁴ Ziemowit Cieřlik and Bartosz Pawłowski, 'Zmiana roli parlamentów narodowych w Unii Europejskiej (według Traktatu reformującego Unię Europejską, przyjętego w Lizbonie, w dniach 17-18 października 2007 r.)', *Mozliwość badania zasady pomocniczości w polskim parlamencie* (2007) 16 *Zeszyty Prawnicze*, 4 (16), 37.

²¹⁵ See the statement of MP J. Rees-Mogg in House of Commons European Committee: Communication Networks, 20.05.2013, Column 19.

²¹⁶ Kiiver, *The national parliaments in the European Union: A critical view on EU constitution-building*.

²¹⁷ Ibid at 49.

²¹⁸ Ibid at 51.

application of *ex ante* review.²¹⁹ What are the implications of institutional design decisions by national parliaments regarding subsidiarity scrutiny processes on the outcomes of such activity?

The institutional design for subsidiarity scrutiny can be very complex, as this chapter shows. The three main scrutiny types - centralised, mixed and decentralised - may not play the pivotal role for the amount of the reasoned opinions issued by chambers. What we observe is that between 2010 and 2013 parliaments applying mixed scrutiny issued the highest number of reasoned opinions, with 118 out of a total of 256, while centralised and decentralised chambers issued 65 and 73, respectively. However, once we control for the fact that chambers applying mixed scrutiny also account for the largest share of chambers in Member States in total, a different picture emerges. Each mixed chamber on average issued only about 5 reasoned opinions, while Centralised and Decentralised chambers were almost twice as active (8 and 10 reasoned opinions per chamber, respectively). However, some of these results are sensitive to the exclusion of individual chambers. For example, amongst the decentralised chambers, the Swedish Riksdag issued 43 of the 73 reasoned opinions of this type. It is thus hard to draw any robust conclusions about the relationship between the type of chamber and its activity in the EWS.

My findings here are connected to the results in the paper by Gattermann and Heftler, who study a sample of 342 Commission legislative acts and investigate the variation in national parliaments' decisions to act or not to act. They find that it is not institutional capacity, but rather the political motivation of chambers that explains whether a reasoned opinion is issued or not. They point in particular to the degree of contestation over EU integration amongst parties in the national system as a predictor for EWS action and whether a Commission proposal is contentious and highly visible.²²⁰

Moreover, it may not necessarily be the best idea to assess the efficiency of national systems through the lens of the number of reasoned opinions issued. It is the scrutiny of EU documents itself that counts, rather the amount of opinions issued. Additionally, some recent

²¹⁹ COSAC also prepared one of the early reports on the activity of national Parliaments. However, in this thesis, I rely on the reports provided by the Commission that gather the most up-to-date information.

²²⁰ Katjana Gattermann and Claudia Heftler, 'Political Motivation and Institutional Capacity: Assessing National Parliaments' Incentives to Participate in the Early Warning System' OPAL Online Paper Series <http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108>

studies look at other aspects of Europeanisation of national parliaments.²²¹ Factors such as the increasing transnational interaction among parliaments or technical expertise and administrative support are currently taken into account. These elements may also play an important role for the subsidiarity scrutiny: more cooperation between parliaments can raise the possibility of raising a ‘yellow’ or ‘orange card,’ whereas bureaucratic, expertise-oriented assistance may increase the quality of reasoned opinions.

Summarising the analysis of this section, the mechanics of the control mechanisms may influence the activity of national parliaments less than the content of proposals and their salience. We will therefore return to this aspect in Chapter 5.

Conclusion

The purpose of this chapter has been to analyse the internal legislative organisation for *ex ante* subsidiarity scrutiny in different EU Member States. EU institutional reforms have always demanded reforms in national level scrutiny, yet the major change in the position of national parliaments introduced by the Lisbon Treaty required entirely new suitable procedures. Constitutional courts supported this view, and recognized the new role of national parliaments in the EU legislative process. The German Federal Constitutional Court even conferred upon the German parliament the responsibility for further European integration. Thus, as a consequence of the Lisbon Treaty and constitutional jurisprudence, constitutional and infra-constitutional changes had to be introduced in order to accommodate the process of subsidiarity review.

As I have demonstrated in this chapter, Member States have offered different models for the regulation of their respective subsidiarity review processes: while some parliaments have entrusted EU Affairs Committees with this task, others have delegated responsibilities to specialised committees or both types of committees. These procedures differ on such points as the moment of detection of a breach, the initiative to draft a reasoned opinion, the role of the government and the role of the plenary session. Regional bodies with legislative powers are also encouraged to participate in the subsidiarity review, but their powers tend to be marginal.

²²¹ Cf. Thomas Christiansen, Anna-Lena Högenauer and Christine Neuhold, ‘National Parliaments in the post-Lisbon European Union: Bureaucratization rather than Democratization?’ OPAL Online Paper Series <http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108> .

Beyond this fragmented picture, however, the impact of the adjustments for subsidiarity scrutiny is becoming increasingly significant. National parliaments actively participate in the subsidiarity review process. Yet, the divergence in activity of parliaments applying the same type of scrutiny leads to the conclusion that the form of scrutiny may not be the decisive point in assessing participation.

Member State	System (centralised, mixed, decentralised)	Breach detection	Initiative	Role of Government	Plenary
Austria (Nationalrat)	Centralised	‘comprehensive pre-screening’; ¹ pre-check for subsidiarity violations done at the administrative level: once per week preparatory lists sent to members of the EU committees. ²	EAC; ³ decisions are adopted by simple majority vote in the Committee. ⁴	the chamber may ask for the opinion of a minister regarding compatibility with subsidiarity; answer within 2 weeks ⁵	MPs can ask for a plenary session, if the deadline has not expired yet; the session should take place within 48h ⁶
Austria (Bundesrat)	Centralised	Id.	EAC ⁷	Id.	Usually final decisions are taken at EU committee level, but there is the possibility to transfer negotiations and voting to the plenary. ⁸
Bulgaria (National Assembly)	Mixed (prior consultation of specialized committees) ⁹	The Annual Working Programme contains a list of the draft acts of the European Union institutions over which the National Assembly shall exercise monitoring and control. ¹⁰	Committee on European Affairs and Oversight of the European Funds	The government sends its position ¹¹	Yes ¹²

¹ Eric Miklin, *The Austrian Parliament and EU Affairs* (OPAL Country Reports, 2012) at 4.

² Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity, available at: <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/atbun.do>.

³ Art 23g(1) Austrian Constitution.

⁴ Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity, available at: <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/atbun.do>.

⁵ Art 23(g)(2) of the Constitution.

⁶ § 31c(4) Nationalrat Rules of Procedure.

⁷ Art 23g(1) Constitution; and § 13a(5) Bundesrat Rules of Procedure.

⁸ Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity, available at: <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/atbun.do>.

⁹ Art 114 (1) Rules of Procedure.

¹⁰ Art 111 (3) Rules of Procedure.

¹¹ Art 113 (1) Rules of Procedure.

Member State	System (centralised, mixed, decentralised)	Breach detection	Initiative	Role of Government	Plenary
Croatia	Centralised ¹³	Annual parliamentary Work Programme with acts that will be scrutinised ¹⁴	Member of Parliament and political groups within 2 weeks; within 7 weeks from the initial date of draft's submission EU Committee may send a reasoned opinion to the Speaker of Parliament, who shall deliver it to the Government and other institutions ¹⁵	N/A	No
Cyprus	Mixed ¹⁶	European Affairs Service: initial check and information to the House Standing Committee on Foreign and send of material concerning the principle of subsidiarity and proportionality; joint examination with a competent sectoral committee(s) possible ¹⁷	Committee on Foreign and European Affairs	The executive is invited in order to present its position	No; forwarded by the President of the House directly to the EU institutions
Czech Chamber of Deputies	Mixed ¹⁸	The proposals are selected by the Committee members, the rapporteur is appointed ¹⁹	Rapporteur of the Committee on European Affairs and EU expert of the Parliamentary institute draft the reasoned opinion ²⁰	The government submits opinion to the Committee ²¹	Yes ²²

¹² Art 114 Rules of Procedure.

¹³ Art 4 of the Act on the Co-Operation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs.

¹⁴ Art 65 of the Standing Orders, Art 5 of the Act on Co-Operation.

¹⁵ Art 13 of Act on the Co-Operation; Art 158 of Standing Orders.

¹⁶ Prior consultation of committees is facultative.

¹⁷ Scrutiny of documents from the European Union and monitoring compliance with the principle of subsidiarity – available on IPEX.

¹⁸ Prior consultation of specialized committees is facultative, § 109a(1)(2) Rules of Procedure.

¹⁹ Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity, on IPEX.

²⁰ Ibid.

²¹ Ibid.

²² <http://www.ipex.eu/IPEXL-WEB/parliaments/institution/czpos.do>.

Member State	System (centralised, mixed, decentralised)	Breach detection	Initiative	Role of Government	Plenary
Czech Senate	Mixed ²³	‘weekly overview,’ Head of the EU affairs committee and the advisor meet to discuss EU documents, including subsidiarity issues; ²⁴ the chairman decides ²⁵	Designated Committee appoints a rapporteur from amongst the members of the Designated Committee ²⁶	information at request of Designated Committee; within 14 days of the delivery of the request ²⁷	Yes ²⁸
Danish Folketing	Mixed ²⁹	On the basis of the Commission’s Annual Legislative Programme, 5-10 proposals pre-selected for subsidiarity review; later checks also possible ³⁰	EAC	explanatory memorandum with subsidiarity assessment	No
Estonia	Mixed (specialized committees may amend) ³¹	N/A	European Union Affairs Committee ³²	Explanatory Memorandum includes subsidiarity assessment ³³	Yes ³⁴
Greece	Mixed (prior consultation of the specialized committees)	Directorate for European Affairs ³⁵	In most cases a joint meeting, of the European Affairs Committee and the competent Committee, is held. ³⁶	1/3 of committee members may request the competent Minister to provide information to the committee ³⁷	Yes (but not obligatory) ³⁸

²³ Prior consultation of specialized committees is facultative, Section 119(d)4 of Rules of Procedure.

²⁴ Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity (on IPEX).

²⁵ Ibid.

²⁶ Section 119d(3) Rules of Procedure.

²⁷ Section 119d(3) Rules of Procedure.

²⁸ Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity (on IPEX).

²⁹ Prior consultation of specialized committees is facultative.

³⁰ Scrutiny of documents coming from the European Union and monitoring compliance with the principle of subsidiarity (on IPEX).

³¹ § 152⁶(2) Riigikogu Rules of Procedure and Internal Rules Act.

³² § 152⁶ (1) Riigikogu Rules of Procedure and Internal Rules Act.

³³ § 152² (1) Riigikogu Rules of Procedure and Internal Rules Act.

³⁴ § 152⁶(4) Riigikogu Rules of Procedure and Internal Rules Act.

³⁵ Scrutiny of documents coming from the European Union and monitoring compliance with the subsidiarity principle. Hellenic Parliament (IPEX).

³⁶ Ibid. Art 41B(2) Standing Orders of the Hellenic Parliament.

³⁷ Art 41B(2) Standing Orders of the Hellenic Parliament.

³⁸ Art 41B(4) Standing Orders of the Hellenic Parliament.

Member State	System (centralised, mixed, decentralised) ³⁹	Breach detection	Initiative	Role of Government	Plenary
Hungary	Centralised ³⁹	No info	EAC ⁴⁰	No info	Plenary decides within 15 days after submission of the reasoned opinion ⁴¹
Ireland	Decentralized ⁴²	Since 2012 each Committee selects the proposals it will scrutinise in detail based on the Commission Annual Work Programme and other sources of information. ⁴³	Select Committee ⁴⁴	Information Note highlighting subsidiarity concerns and implications for Ireland ⁴⁵	Yes; reasoned opinion has a priority ⁴⁶
Italian Senato	Decentralized	N/A	Committee responsible for the subject matter; Foreign Affairs and EU Affairs committees are asked for opinions which are annexed to the report ⁴⁷	Within 20 days of the transmission, the relevant ministry sends in an opinion on the proposal, including subsidiarity ⁴⁸	Yes; the President of the Senate announces the report before the Senate ⁴⁹
Italian Camera dei Deputati	Mixed (prior consultation of specialized committees)	N/A	N/A	Id.	N/A
Latvian Saeima	Mixed (prior consultation of specialized committees) ⁵⁰	N/A	EAC	EAC asks for opinion of the government ⁵¹	No plenary involved ⁵²

³⁹ § 134/D(1) Rules of Procedure.

⁴⁰ § 134/D(2) Rules of Procedure.

⁴¹ § 134/D(4) Rules of Procedure.

⁴² A (specialized, eg. Transport and Communication) Select Committee ‘may consult with such other Committees and such stakeholders as it considers appropriate’ Dáil Standing Order 105(3)(a).

⁴³ House of Commons, European Scrutiny Committee, Reforming the European Scrutiny System in the House of Commons, Twenty-fourth Report of Session 2013-14, Vol 1 at 119.

⁴⁴ Dáil Standing Order 105 (1); Seanad Standing Order 101(1).

⁴⁵ Scrutiny of documents coming from the European Union and monitoring compliance with the subsidiarity principle. Irish Parliament (IPEX)

⁴⁶ Dáil Standing Order 105(3)(c); Seanad Standing Order 101(3)(d).

⁴⁷ Rule 144 (1) Rules of the Senate.

⁴⁸ Art 6(4)(a) Law N. 234/2012.

⁴⁹ Rules of the Senate 144(2).

⁵⁰ Art 185.1 (1) Rules of Procedure of Saeima ‘The Saeima shall participate in EU affairs through the European Affairs Committee unless the Saeima has ruled otherwise.’ But Art 185.4 (4) states that ‘the European Affairs Committee may send the official positions of the Republic of Latvia, as well as legislative proposals of the European Union and documents of other EU institutions, to other Saeima committees for them to consider and hand down decisions.’ [emphasis added]

⁵¹ Scrutiny of documents coming from the European Union and monitoring compliance with the subsidiarity principle. Latvian Parliament (IPEX)

⁵² Ibid.

Member State	System (centralised, mixed, decentralised)	Breach detection	Initiative	Role of Government	Plenary
Lithuanian Seimas	Mixed (prior consultation of specialized committees) ⁵³	N/A	EAC	Government sends an opinion ⁵⁴	Plenary; submission to the plenary not later than 3 weeks before the deadline ⁵⁵
Malta	centralized	The proposals are first scrutinized by Research Analyst section of the Foreign and European Affairs Committee (FEAC) ⁵⁶	Standing Committee on Foreign and European Affairs	N/A	Yes
Portugal	Mixed (prior consultation of sectoral committees)	choice of proposals from European Commission's Work Programme and information to EAC ⁵⁷	EAC ⁵⁸	N/A	Yes ⁵⁹
Romania Senate& Chamber of Deputies	Mixed (domination of specialized committees with final approval by the EAC)	Scrutiny of annual Commission's Work Programme ⁶⁰	EAC ⁶¹	Yes; with regard to the priority list based on Commission Working Programme within 10 working days from the notification of the act ⁶²	Yes ⁶³
Slovakia National Council	Mixed (domination of EAC with a prior consultation of a specialized committee) ⁶⁴	The EAC employees check the initial compliance with subsidiarity ⁶⁵	EAC or a specialized committee	The government, not later than three weeks after receiving the draft from the Commission submits an assessment of the draft, including subsidiarity compliance ⁶⁶	EAC can decide by simple majority ⁶⁷

⁵³ 1806(5) Seimas Statute.

⁵⁴ 1807(2) point 2 Seimas Statute.

⁵⁵ 1806(5-8) Seimas Statute.

⁵⁶ Scrutiny of documents coming from the European Union and monitoring compliance with the subsidiarity principle. Maltese House of Representatives. (IPEX)

⁵⁷ COSAC, 19th Bi-Annual Report, p. 28.

⁵⁸ Art 3(2) Law no. 43/2006 of 25 August 2006 as amended by Law no. 21/2012 of 17 May 2012.

⁵⁹ Art 3(3) Law no. 43/2006 of 25 August 2006 as amended by Law no. 21/2012 of 17 May 2012.

⁶⁰ Art 4(1) Act on cooperation between the Parliament and the Government in the field of European affairs

⁶¹ Angela Tacea, *The Romanian Parliament and EU Affairs* (OPAL Country Reports, 2012) at 5.

⁶² Art 14(2) Act on the cooperation between the Parliament and the Government in EU Affairs.

⁶³ Art 14(5) Act on cooperation between the Parliament and the Government in EU affairs.

Member State	System (centralised, mixed, decentralised)	Breach detection	Initiative	Role of Government	Plenary
Slovenia National Assembly (both votes on behalf of Slovenia)	Mixed (domination of specialized committee with an approval of EU affairs committee)	N/A	1/4 of deputies or a decision adopted by the EAC or specialized committee; the request is forwarded to the Legislative and Legal Service, which prepares opinions on whether to launch inquiry into subsidiarity; if yes the request is forwarded to the specialized committee, which prepares the reasoned opinion and forwards it to the EAC to be adopted which is next referred to for the plenary ⁶⁸	N/A	yes ⁶⁹

⁶⁴ IPEX, Slovakia description (<http://www.ipex.eu/IPEXL-WEB/parliaments/institution/skrad.do>).

⁶⁵ Andrea Figulova, *The Slovak Parliament and EU Affairs* (OPAL Country Reports, 2012) at 4.

⁶⁶ Section 58a(8) of Act on the National Council of the Slovak Republic, No. 350/1996 on Rules of Procedure as amended.

⁶⁷ Figulova at 4.

⁶⁸ Art 154m (1-8) Rules of Procedure of the National Assembly of 2.04.2012 (consolidated version).

⁶⁹ Art 154m (9-12) Rules of Procedure of the National Assembly of 2.04.2012.

5.1.1 Reasoned Opinions by Chamber

Country	Chamber	Type	2010	2011	2012	2013
Austria	Bundesrat	Centralised	2	1	3	6
Austria	Nationalrat	Centralised	1	0	1	0
Belgium	Chambre des Représentants	Mixed	0	1	3	1
Belgium	Sénat	Mixed	0	1	0	1
Bulgaria	Narodno Sabranie	Mixed	0	2	0	0
Cyprus	House of Representatives	Mixed	0	1	1	1
Czech Republic	Poslanecká sněmovna	Mixed	1	0	0	2
Czech Republic	Senát	Mixed	1	0	0	2
Denmark	Folketinget	Mixed	2	1	3	1
Estonia	Riigikogu	Mixed	0	0	0	1
Finland	Eduskunta	Mixed	0	1	1	1
France	Assemblée Nationale	Mixed	0	1	0	1
France	Sénat	Mixed	3	1	7	4
Germany	Bundesrat	Mixed	1	1	5	3
Germany	Bundestag	Mixed	1	1	1	0
Greece	Chamber of Deputies	Mixed	0	0	0	3
Hungary	Országgyűlés	Centralised	0	0	0	1
Ireland	Dáil Eireann	Decentralised	n.a.	1	0	0
Ireland	Oireachtas ¹	Decentralised	0	n.a.	0	3
Italy	Camera dei Deputati	Mixed	0	2	0	0
Italy	Senato della Repubblica	Decentralised	1	3	1	2
Latvia	Saeima	Mixed	0	0	1	1
Lithuania	Seimas	Mixed	2	0	1	6
Luxembourg	Chambre des Députés	Mixed	3	7	3	2
Malta	Kamra tad-Deputati	Centralised	0	2	1	5
Netherlands	Both Chambers	Decentralised	2	2	1	0
Netherlands	Eerste Kamer Staten Generaal	Decentralised	0	0	2	3
Netherlands	Tweede Kamer Staten Generaal	Decentralised	0	1	3	5
Poland	Sejm	Centralised	2	5	3	2
Poland	Senat	Mixed	4	4	1	2
Portugal	Assembleia da Republica	Mixed	0	1	1	1
Romania	Both Chambers	Mixed	0	1	n.a.	0
Romania	Camera Deputaţilor	Mixed	0	2	0	2
Romania	Senatul	Mixed	0	2	0	3
Slovakia	Národná rada	Mixed	0	2	1	0
Slovenia	Državni svet	Not participating	0	0	0	0
Slovenia	Državni zbor	Mixed	0	0	0	1

¹ For 2010, the Commission Report refers to 'Oireachtas (both chambers)'.

Country	Chamber	Type	2010	2011	2012	2013
Spain	Congreso de los Diputados and Senado (both chambers)	Centralised	0	2	2	5
Sweden	Riksdagen	Decentralised	3	11	20	9
United Kingdom	House of Commons	Centralised	3	3	3	5
United Kingdom	House of Lords	Centralised	2	1	1	3
Total			34	64	70	88

Source: Own compilation of Commission Reports for 2010-2013

5.1.2 Reasoned Opinions by Chamber Type

	Number of Chambers	2010	2011	2012	2013	Total
Centralised	8	10	14	14	27	65
Decentralised	7	6	18	27	22	73
Mixed	25	18	32	29	39	118

Chapter 4: Status and Design of the *ex post* subsidiarity review¹

1 Introduction

The decision to grant national parliaments the power to review the compliance of EU draft legislative acts with the subsidiarity principle was partially motivated by dissatisfaction with the performance of the ECJ in securing its observance. Indeed, with the introduction of the subsidiarity principle in the Maastricht Treaty, the principle became subject to the ECJ's jurisdiction, which was initially expected to 'open the floodgates to constant litigation.'² While the ECJ's jurisprudence on subsidiarity has its supporters, who argue that the ECJ applied subsidiarity, but under a different heading of review,³ the majority view is that the ECJ did not become an effective guardian of subsidiarity.⁴ Its jurisprudence on the subsidiarity principle has been widely criticised by scholars, in particular, the Court's unwillingness to 'deal with subsidiarity frontally' and its 'misleading interpretation' of the principle, because of a focus on its procedural nature, instead of a cost/benefit test for the necessity of EU action.⁵ Moreover, the Court's case law might be easily described as a 'drafting guide,' which means that, as long as EU institutions use the Court's vague vocabulary and draft the EU legislation accordingly, the Court has no ground to annul such an act on the basis of a subsidiarity violation.⁶

Despite this criticism, and the fact that the Court has never annulled an EU act because of a subsidiarity violation, Ziller adopts the view that it would be 'quite erroneous' to conclude that it is not necessary to invoke subsidiarity before the Court.⁷ Two new sources of reviving the ECJ approach to subsidiarity have recently gained focus in academic circles. First, an argument was made that the impact assessments prepared by the Commission in the pre-legislative phase will 'facilitate' judicial review of subsidiarity.⁸ The use of this 'process-based tool' in the Court's

¹ This chapter draws upon and extends my contribution 'Institutional Design of the Member States for the *ex post* subsidiarity scrutiny' in: *Democracy and subsidiarity in the EU. National parliaments, regions and civil society in the decision-making process*, M. Cartabia, N. Lupo and A. Simoncini (eds), Il Mulino 2013.

² Toth, 'The principle of subsidiarity in the Maastricht Treaty', 1101.

³ Thomas Horsley, 'Subsidiarity and the European Court of Justice: Missing Pieces in the Subsidiarity Jigsaw?' (2012) 50 *Journal of Common Market Studies* 267, 270.

⁴ See ECJ's cases: Case C-84/94 *United Kingdom v. Council* [1996] ECLI:EU:C:1996:431.

(Working Time Directive); Case C-233/94 *Germany v. Parliament and Council* [1997] ECLI:EU:C:1997:231.

(Deposit-Guarantee Schemes); and Case C-491/01 *British American Tobacco (Investments) and Imperial Tobacco* [2002] ECLI:EU:C:2002:741. These cases are discussed in Estella De Noriega, de Búrca, 'The principle of subsidiarity and the Court of Justice as an institutional actor', 223-226 and Davies, 'Subsidiarity: the wrong idea, in the wrong place, at the wrong time', 72-75

⁵ Martinico at 655.

⁶ Cf. Stephen Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide' (2011) 12 *German Law Journal* 827.

⁷ Ziller, 'Le principe de subsidiarité' at 533.

⁸ Craig, 'Subsidiarity: A political and legal analysis', 78.

jurisprudence was seen for the first time in the *Vodafone* case.⁹ Second, subsidiarity requests may now come from national parliaments, according to Article 8 of Protocol 2, which foresees ECJ jurisdiction ‘in actions on ground of infringement of the principle of subsidiarity by a legislative act, brought in accordance with the rules laid down in Article 263 of the Treaty on the Functioning of the European Union by Member States, or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof.’ This procedure will be the focus of this chapter. It will be shown that national parliaments have adjusted their national rules of procedure to participate in the mechanism of *ex post* subsidiarity scrutiny under Article 8 of Protocol 2. For example, in the UK, the House of Commons and the House of Lords have signed two linked Memoranda of Understanding with the government, concerning the procedure of lodging the subsidiarity action and its financing.¹⁰ The two chambers gained powers regarding the conduct of proceedings as well as concerning the choice of and instructions issued to Counsel; the chambers will have to agree to the written statements and submissions with the UK Agents.¹¹

This chapter will first briefly outline the on-going criticism of the Court of Justice and its subsidiarity analysis, also taking into account the judgments issued after the entry into force of the Lisbon Treaty.¹² Next, Section 2 will discuss the status of the subsidiarity action. An analysis of national procedures for the *ex post* scrutiny follows in Section 3. The methodological ‘accordion’ is open in this chapter to show different designs of *ex post* scrutiny (see annex); I reconstruct some of them in detail to illustrate the main differences between them.

2 Subsidiarity jurisprudence of the ECJ

Paul Craig indicates that since the entry into force of the Maastricht Treaty subsidiarity challenges played a role in fewer than 20 cases, with some of them repeating previous challenges. Hence, the overall number adds up to little above ten cases over 20 years.¹³ EU scholars have attempted to find reasons for the scarcity of relevant jurisprudence and its marginal scope with regard to the subsidiarity principle.¹⁴ Estella explained it first via the character of the subsidiarity principle itself, which, according to him, is a ‘catch-all formula of good government and common sense, rather than

⁹ Yet, it was used to discuss proportionality. Groussot and Bogojević at 235 and 246.

¹⁰ See House of Commons, European Scrutiny Committee, 16th Report, Session 2013-14.

¹¹ See Memorandum of Understanding on Implementing Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, point 7 in House of Commons, European Scrutiny Committee, 16th Report, Session 2013-14.

¹² This chapter looks only at the use of the subsidiarity principle by the ECJ in reviewing acts of other institutions, but it does not elaborate on the impact of subsidiarity on the Court’s exercise of its own powers. In this respect cf. de Búrca, ‘The principle of subsidiarity and the Court of Justice as an institutional actor’ and Horsley.

¹³ Craig, ‘Subsidiarity: A political and legal analysis’ at 80.

¹⁴ For an overview of the ECJ’s subsidiarity jurisprudence and its analysis see Tridimas.

a well-defined political or philosophical principle,' and is without 'clear legal content.'¹⁵ A second possible explanation of the Court's approach in Estella's view, is the political agenda of the Court. Specifically, the Court is guided by the 'idea of integration,' which may be endangered by the 'anti-integration' character of the subsidiarity principle, directed specifically against the growth of EU competences.¹⁶ Yet, as the Court depends on the arguments of the parties; when these are raised by the parties, the Court must adjudicate on this basis. In consequence, there is not be much space for Court's own agenda, yet such room is left in the case of interpretation of the subsidiarity principle. The third explanation, in the view of Biondi, is the 'bipolar ethos' inherent in the subsidiarity principle, specifically the preservation of national autonomy and comparative efficiency of centralisation, that explains the adherence of the Court to the separation of powers: the Court tried to avoid 'substituting its own judgment for that of the institutions, in assessing a choice which was ultimately perceived as political.'¹⁷ Fourth, Craig explains the low number of subsidiarity judgments with the argument that if Member States adopted a legislative act via QMV, it implied that there were enough Member States that thought that a given EU action fulfilled the subsidiarity test. Bringing proceedings before the ECJ would then necessarily engender legal opposition from the Member States that voted in favour of the proposal.¹⁸

Some scholars expected that the Court would not 'push the extent of its judicial review, as far as subsidiarity principle is concerned, any further than is absolutely necessary for ensuring and respecting the Rule of Law.'¹⁹ This transpired to be the case: currently, some urge the Court to insist 'more sternly on transparency and reason-giving in support of legislative choices made'²⁰ and to give up on the manifest-error doctrine. In this respect, Kumm argues for a 'doctrinal framework' for subsidiarity and proportionality,²¹ whereas others see a new opportunity for the Court by trying to connect subsidiarity and sincere cooperation²² or in the subsidiarity action provided for by Article 8 of Protocol No. 2.²³ In the next section, I will concentrate on this new action.

¹⁵ Estella De Noriega at 96 & 139.

¹⁶ Ibid at 7. This approach of the members of the Court Estella drew from their doctrinal writings.

¹⁷ Biondi at 213 & 220. Similar view was expressed at the moment of the entry into force of the Maastricht Treaty by A.G. Toth. Cf. Toth, 'The principle of subsidiarity in the Maastricht Treaty', 1102.

¹⁸ Craig, 'Subsidiarity: A political and legal analysis', 81.

¹⁹ Emiliou at 405.

²⁰ Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide', 859.

²¹ Mattias Kumm, 'Constitutionalising Subsidiarity in Integrated Markets: The Case of Tobacco Regulation in the European Union' (2006) 12 European Law Journal 503. Such a 'S&P Framework' consists of the following three prongs: 'federal intervention has to further legitimate purposes, has to be necessary in the sense of being narrowly tailored to achieve that purpose, and has to be proportionate with regard to costs or disadvantages relating to the loss of Member States' regulatory autonomy.'

²² Martinico at 658.

²³ See Biondi at 223.

The judgments of the Court issued after the entry into force of the Treaty of Lisbon neither cast more light on the subsidiarity principle, nor provide for its strengthening. To start with, in Case C-176/09, brought by Luxembourg against the EU Legislator, the former requested the annulment of the directive on airport charges, which imposes airport charges on commercial airports located in Member States the annual traffic of which is over five million passenger movements, and to the airports with the highest passenger movement in each Member State.²⁴ The latter part of the provision – concerning main airport of the Member States – was the problematic one in the case at stake. Luxembourg saw the directive as discriminatory towards Luxembourg Aéroport Findel, which serves fewer than five million passenger a year, but which is Luxembourg's main airport. In consequence, in the view of Luxembourg, the directive treats Findel differently from the Belgian Charleroi or German Hahn airports, which serve more passengers than the Luxembourg airport, yet still fall below the five million mark, and which are not the main airports in the respective Member States. With regard to a possible subsidiarity violation, Luxembourg argued that the directive is unnecessary for airports serving fewer than 5 million passengers a year; especially as the directive exempts many airports larger than Findel Airport.²⁵

Advocate General Mengozzi in his opinion stated that the directive does not violate subsidiarity, as allowing Member States with main airports of less than 5 million passengers per year to regulate airport charges on their own 'would give rise to the divergent development of national rules,' which in the future 'would lead to inefficiency, and in the immediate present also make it easier for airports to adopt abusive conduct to the detriment of the airlines,' and last but not least, air traffic as an 'international matter' in its nature is 'ill suited for being regulated at the level of individual Member States.'²⁶ The Court followed the assessment of the Advocate General. Accordingly, Luxembourg did not show how national rules could sufficiently achieve the objective pursued by Directive in cases where the main airport does not reach the minimum amount of passengers indicated by the directive.²⁷

One of the other recent ECJ cases on the subsidiarity principle concerned its applicability to the action of the Court of Auditors in case C-539/09, *Commission v Germany*. In this regard, Advocate General Trstenjak stated that the only limitation to the scope of the subsidiarity principle is the 'nature of the competences exercised by the European Union Institutions.'²⁸ Accordingly, the

²⁴ Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECLI:EU:C:2011:290.

²⁵ Ibid, para 33.

²⁶ Case C-176/09, *Opinion of the Advocate General Mengozzi in Luxembourg v Parliament and Council* [2010] ECLI:EU:C:2010:776, para 109.

²⁷ Case C-176/09 *Luxembourg v Parliament and Council* [2011] ECLI:EU:C:2011:290, para 81.

²⁸ Case C-539/09 *Opinion of Advocate General Trstenjak in Commission v Germany* [2011] ECLI:EU:C:2011:345, para 81.

principle of subsidiarity binds the Court of Auditors, except where it exercises an exclusive competence.²⁹ The ECJ decided that it was not necessary to adjudicate whether subsidiarity should be relied on in relation to audits for the purposes of deciding between the interventions of the Court of Auditors and national audit bodies. However, the Court assumed that even if the principle of subsidiarity were applicable, the cross-border dimension of the administrative cooperation would in any event lead to the conclusion that the audit at stake was consistent with that principle. Moreover, in the view of the ECJ, as such audit ensures the proper cooperation of the Members States' authorities, it is necessarily better carried out centrally at EU level by the Court of Auditors, since it extends to all of the Member States, unlike the power of the national courts of auditors.³⁰

The conclusions from these two judgments are the following. Both AGs and the Court indulge in a 'national insufficiency' and 'EU comparative sufficiency test,' partially enriched by a 'cross-border activity test;' yet they do not check, like AG Maduro in the *Vodafone* case, whether the national democratic process is likely to fail to protect cross-border activities due to a lack of special interest.³¹ In the first case, *Luxembourg v. EP and Council*, the Court shifted the burden to prove such an interest onto the plaintiff. In the second case regarding the Court of Auditors, the sole cross-border dimension of the audit was enough to adjudicate compatibility with the subsidiarity principle. Simply, the Court did not engage in an examination of the relevant interests at stake.

There are also two new pending actions of annulment concerning some provisions of the CRD-IV package (Capital Requirements Directive 2013/36/EU and Capital Requirements Regulation) concerning the so-called 'cap on bankers' bonuses' and granting the European Bank Authority some tasks in this respect.³² While the UK contested, *inter alia*, whether these provisions comply with the subsidiarity principle, Estonia argued a breach of essential procedural requirements, as the obligation to state reasons laid down in Article 296 TFEU was allegedly not fulfilled by the adopted directive.

3 Status of the subsidiarity action

Whereas some claim that with the entry into force of the Maastricht Treaty, subsidiarity, as a part of the Treaty, became 'justiciable' – 'capable of judicial resolution' – before the Court of Justice, allowing for its review under the action or annulment or preliminary ruling on the basis of a referral

²⁹ Ibid, para 85. On the application of subsidiarity principle only to the shared competence, see also Case C-288/11 *P Mitteldeutsche Flughafen and Flughafen Leipzig-Halle v Commission* [2012] ECLI:EU:C:2012:821, para 79.

³⁰ Case C-539/09 *Commission v Germany* [2011] ECLI:EU:C:2011:733, para 85.

³¹ Case C-58/08 *Opinion of Advocate General Poiares Maduro in Vodafone and others* [2009] ECLI:EU:C:2009:596, para 34.

³² Case C-507/13 Action brought on 20 September 2013 *United Kingdom v Parliament and Council*; case C-508/13 Action brought on 23 September 2013 *Estonia v Parliament and Council*.

by a national court,³³ others argue that only since the advent of the new subsidiarity action created by the Lisbon Treaty, can ‘subsidiarity [leave] its current status of dubious justiciability, and [become] a ground of judicial review.’³⁴

Working Group I on the Principle of Subsidiarity, in its report for the Convention on the Future of Europe, proposed a system in which a national parliament that has issued a reasoned opinion under the EWS could bring an action for violation of the principle of subsidiarity before the Court.³⁵ The majority of Working Group I, however, rejected the possibility for the regions of Member States with legislative capacities to lodge a similar action. It was argued that ‘the degree of and arrangements for the involvement of regional and local authorities in the drafting of Community legislation should be determined solely in the national framework.’³⁶ In addition, the idea of establishing an ad hoc ‘subsidiarity chamber’ or an *ex ante* judicial mechanism (between the adoption of the Community act and its entry into force), similar to the French Conseil Constitutionnel, was rejected.³⁷ Other ideas included the possibility of giving national parliaments the right to bring subsidiarity actions to the ECJ via COSAC.³⁸

The final outcome of the Convention with regard to the subsidiarity principle – Protocol No. 2 – provided for a subsidiarity action, yet without the requirement of a prior reasoned opinion for such an action.³⁹ The possibility of lodging an action on subsidiarity violations was also granted to the Committee of the Regions in areas in which an obligation to consult this body existed.⁴⁰

Protocol No. 2 attached to the Treaty on the European Union and the Treaty on the functioning of the European Union borrowed the subsidiarity action from its Constitutional Treaty counterpart. According to Article 8 of Protocol No. 2, national parliaments may lodge an action notified by Member States in accordance with their legal order on behalf of their national parliament or a chamber thereof. This new avenue of bringing a subsidiarity action applies the ‘ordinary’ procedure

³³ Toth, ‘Is Subsidiarity Justiciable?’, 272-277. Within the preliminary ruling procedure, according to Toth there are two possible ways. First, an individual may argue that an EU act upon which the case depends is invalid, for example because the act was adopted contrary to the subsidiarity principle. If convinced of this argument, national court may refer to the ECJ for a preliminary ruling. Second, in the national proceedings a question might arise that a specific measure is ultra vires; if relevant for the proceedings national court has to refer to the ECJ. For example the *Vodafone* case has been adjudicated in the preliminary reference proceedings, in which the applicant claimed that a EU regulation was invalid, as offending against, among others, the subsidiarity principle. See para 29.

³⁴ Davies, ‘The post-Laeken division of competences’, 692

³⁵ CONV 286/02, Point II c.

³⁶ Ibid.

³⁷ As Advocate General Jacobs explained at one of the meetings of Working Group I, ‘the Court did not think it necessary for the time being to have a special chamber for matters concerning the principle of subsidiarity (however, where the need arose, the necessary organisational steps would be taken).’ European Convention, Summary of the meeting on 25 June 2002, CONV 156/02, 28.06.2002, pages 3-4.

³⁸ CONV 210/02 at 2.

³⁹ Art 8 (1), Protocol No. 2.

⁴⁰ Art 8 (2), Protocol No. 2.

of the action for annulment enshrined in Article 263 TFEU. In addition, similarly to Protocol No. 2 to the Constitutional Treaty, Article 8(2) provides for an action on grounds of subsidiarity violation for the Committee of the Regions against legislative acts on which the Committee of the Regions is consulted.

Weatherill argued that the subsidiarity action ‘does nothing more than state the current position,’ presumably with the intention of placing an obligation upon the Member State when a national parliament makes a decision about a subsidiarity violation.⁴¹ To test this argument, starting with the analysis of Article 263 TFEU, to which Article 8 of Protocol No. 2 refers, I discuss the standing and grounds for subsidiarity action in light of the action for annulment. Additionally, I furnish an example of the indirect participation of national parliaments in the procedure for an action for annulment prior to the entry into force of the Lisbon Treaty.⁴²

Regarding the standing rules of Article 263 TFEU, three types of applicants may lodge an action for annulment. In the EU legal literature they are labelled as ‘privileged’ (Member States, the European Parliament, the Council or the Commission), ‘semi-privileged’ (the Court of Auditors, the European Central Bank and the Committee of the Regions) and ‘non-privileged’ (natural or legal persons).⁴³ ‘Privileged applicants’ represent public interest that require judicial protection, ‘semi-privileged’ applicants protect their own institutional competences, whereas, as stated in Article 263(4) TFEU, ‘non-privileged applicants’ must prove that an act is addressed to them or is of direct and individual concern or is a regulatory act, which is of direct concern to them and does not entail implementing measures. Trying to fit national parliaments into the scheme of ‘privileged’, ‘semi-privileged’ and ‘non-privileged’ applicants, national parliaments could be considered ‘indirect semi-privileged applicants.’⁴⁴ The notion of ‘indirect’ means that national parliaments do not bring the action themselves but through their governments, and ‘semi-privileged’ indicates that the violation touches upon only one of their institutional prerogatives, specifically the supervision of the observance of the principle of subsidiarity by EU institutions. Yet, it must be highlighted that national parliaments do not have an independent standing in the ECJ; thus the Treaty of Lisbon did not introduce any legally important changes in respect of standing.

In accordance with Article 8(1) of Protocol No. 2, Member States bring an action in response to an infringement of the principle of subsidiarity on behalf of their national parliament or its chamber in accordance with national rules. The question is, whether subsidiarity infringements should be seen

⁴¹ Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide’, 852.

⁴² See Committee of the Regions, Practical Guide on the infringement of the subsidiarity principle, No 47, available at <https://portal.cor.europa.eu/subsidiarity/Publications/Documents/Guide%20on%20SubsidiarityFINAL.pdf>.

⁴³ Derrick Wyatt and Alan Dashwood, *Wyatt and Dashwood’s European Community Law* (Hart 2011) at 155.

⁴⁴ Thanks to Robert Schütze for pointing this to me.

as a new ground for an action for annulment. For all of the applicants, Article 263(2) TFEU enlists four general grounds for annulment: lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law related to their application, or misuse of powers. A subsidiarity violation clearly falls within the scope of the infringement of an essential procedural requirement understood as the requirement of ‘EU legal acts to provide an adequate statement of the reasons on which they are based’ or of an infringement of the Treaty, meaning that ‘an act contravenes a provision of the Treaty or is inconsistent with a parent measure.’⁴⁵ In the first case, the ground includes breaches of the procedural dimension of the subsidiarity principle, whereas the second concerns breaches of the material aspect of subsidiarity principle.⁴⁶ Therefore, a violation of the subsidiarity principle is not an additional ground under the Article 263 TFEU procedure. In addition, the text of Article 8 of Protocol No. 2 directly refers to ‘actions on grounds of infringement of the principle of subsidiarity by a legislative act,’ which implies that in subsidiarity actions, national parliaments should focus exclusively on subsidiarity. The textual interpretation of this provision thus implies that cases where national parliaments would like to extend the scope of their action and embrace, for instance, a competence violation by the legislative act are excluded. Nonetheless, the explicit indication of the scope of subsidiarity action may not please national parliaments. While Article 6(1) of Protocol No. 2 only mentions violations of the principle of subsidiarity in the *ex ante* form of subsidiarity scrutiny, national parliaments tend to go beyond this limitation, which was illustrated in the EPPO case in Chapter 2. In sum, a subsidiarity violation as a ground for an action is already included in the grounds listed in Article 263(2) TFEU, and national parliaments should not extend their actions beyond subsidiarity infringements, relying on a simple reference to Article 263 TFEU by Protocol No. 2.

As was shown above, Article 8 of Protocol No. 2 makes subsidiarity action accessible for national Parliaments, but only indirectly. No new special procedure has been created.⁴⁷ In fact, there is no separate standing for national parliaments, but their position, as mentioned before, may be viewed as ‘indirect semi-privileged applicants.’ Moreover, as Article 8(1) of Protocol No. 2 does not set out the details of the subsidiarity action, but refers to the rules laid down in 263 TFEU, the deadline for submission of a subsidiarity action is two months from the publication of the legislative measure, in line with Article 263(6) TFEU.

⁴⁵ Wyatt and Dashwood at 180. Also Toth qualified subsidiarity violation as ‘infringement of the Treaty’ under Article 173 EC, current Article 263 TFEU. Cf. Toth, ‘Is Subsidiarity Justiciable?’, 274.

⁴⁶ Cf. Estella De Noriega at 106-114.

⁴⁷ See the same view in Louis, ‘Quelques remarques sur l’avenir du contrôle du principe de subsidiarité’ at 303.

The *ex post* subsidiarity scrutiny formally introduces national parliaments into the system of EU judicial review; however an unofficial avenue was already used in the past.⁴⁸ In fact, before the Treaty of Lisbon entered into force, national parliaments could induce governments into pursuing a subsidiarity violation in the ECJ. In the case C-377/98, the Netherlands brought an action seeking the annulment of Directive 98/44 on the legal protection of biotechnological inventions.⁴⁹ This directive was based on Article 100a EC Treaty (now Article 114 TFEU) and aimed at protecting biotechnological inventions through the patent laws of the Member States. While lodging its action against the directive, the Dutch government stated openly that it was acting upon the ‘express request’ of the Dutch Parliament, which was against genetic manipulation of animals and plants and issuing patents for the products of biotechnological procedures liable to promote such manipulation.⁵⁰ Specifically, one of the pleas of the Dutch action was a violation of the subsidiarity principle by that directive. Nonetheless, the Court dismissed the action of the Netherlands, applying the tests of ‘national insufficiency’ and ‘comparative efficiency.’ As regards the first, the Court maintained that the objective of the directive ‘to ensure smooth operation of the internal market by preventing or eliminating differences between the legislation and practice of the various Member States in the area of the protection of biotechnological inventions, could not be achieved by action taken by the Member States alone.’⁵¹ The second test was argued by stating that ‘[a]s the scope of that protection has immediate effects on trade, and, accordingly, on intra-Community trade, it is clear that, given the scale and effects of the proposed action, the objective in question could be better achieved by the Community.’⁵²

The case of the Dutch parliament seems to show that national parliaments already used their powers to influence the action of annulment prior to the entry into force of the Treaty of Lisbon. Hence, the question concerning the novelty of Article 8 of Protocol No. 2 remains. It seems that the part of Article 8 of Protocol No. 2 which reads ‘or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber thereof’ – demanding the establishment of national procedures for subsidiarity action – is the crucial and new issue. Article 8 of Protocol No. 2 does not formally oblige Member States to adjust national level procedures for the purposes of bringing a subsidiarity action. Yet, Protocol No. 2, by granting to national parliaments the possibility of participating in the *ex post* subsidiarity scrutiny, informally forces the Member States to take legislative steps in order to enable this new competence of national parliaments. The mentioning of

⁴⁸ Thanks to Takis Tridimas for reminding me of this case.

⁴⁹ Case C-377/98 *Netherlands v Parliament and Council* [2001] ECLI:EU:C:2001:523.

⁵⁰ Ibid para 4.

⁵¹ Ibid para 32.

⁵² Ibid para 32.

the national legal order by Protocol No. 2 should represent a motivation for Member States to incorporate the subsidiarity action within their national provisions and practice.

4 Design of the subsidiarity action

While the EU level leaves much leeway to enable a connection between national parliaments and the ECJ, some national regulations tend to limit access to the Court and therefore diminish the role that national parliaments might have played. Accordingly, the examples below depict the more or less generous provisions on access to the Court, in the sense that they make the submission of the action easier or harder. The first subsection gives an overview of these procedures, while the second conducts a more detailed comparison of their specific elements.

4.1 Overview of national provisions on *ex post* scrutiny

The majority of national parliaments have received powers to lodge subsidiarity actions. However, in some Member States, these powers are quite limited (Luxembourg, Spain). No measures have been taken in Cyprus and Greece. The annexed table gives a full overview of the relevant procedures. Here I will discuss some selected countries in detail.

Recent amendments of the Rules of Procedure in Finland state that the Grand Committee decides on the Eduskunta position regarding an action before the ECJ by handing in a report and recommendation in the plenary session.⁵³ If the Grand Committee finds a breach of subsidiarity, the parliament instructs the government to take action before the ECJ.⁵⁴ Likewise, in Denmark, on the recommendation of the European Affairs Committee, a majority in the Folketing may decide to bring an action before the ECJ.⁵⁵

In Germany, the Basic Law, the new Responsibility for Integration Act and the Rules of Procedure of the Bundestag and the Bundesrat contain the necessary provisions for the subsidiarity review. First, the federal government, according to §13 (7) IntVG, informs both the Bundestag and the Bundesrat as quickly as possible of the finalisation of the EU legislative process. This information includes an assessment of compatibility with the principles of subsidiarity and proportionality. Second, the right to bring an action to the ECJ for both of the chambers is anchored in the Basic Law, Article 23 (1a). For the Bundestag, an initiative requires one-fourth of its members,⁵⁶ whereas

⁵³ Reforming Law 1023/2009; Section 30 of the Rules of Procedure.

⁵⁴ Annex to the 13th Bi-annual Report on Developments in European Union Procedures and Practices Relevant to Parliamentary Scrutiny at 136.

⁵⁵ Report on Consideration of EU matters by the Folketing in relation to subsidiarity checks, 9th April 2010, European Affairs Committee 2009-10 EUU alm. del – Bilag 460 (annex 460) Public.

⁵⁶ Article 23 (1a) Basic Law, §12 (1) IntVG, § 93d (2) of Rules of Procedure.

the provisions remain silent on a comparable threshold in the Bundesrat.⁵⁷ Some authors point out that the one-fourth threshold is highly disputable since it does not express the right of the Bundestag as a chamber but in fact a right of a minority (Minderheitsrecht).⁵⁸ Thus it entitles a minoritarian opposition to file an action. It is an issue whether the threshold only concerns initiatives to discuss bringing an action or whether it results in bringing an action itself.⁵⁹ Moreover, the idea of the minority initiative in German law is traditionally connected with situations where the majority does not have an interest in being active (e.g. in the interrogation committee - Article 44 I S.1 Basic Law). Further, the literature underlines the constitutional issues involved in the minority right.⁶⁰ Namely, Article 42 (2) S.1 and Article 52 (3) S.1 Basic Law prescribe a general rule of majority vote, whereas Article 23 (1a) S.3 provides the possibility of a minority threshold, regulated in details through an infra-constitutional act. Finally, another view stresses that a lower threshold is helpful in cases where the federal government aims at avoiding the national parliament by bringing a proposal to the Commission and deciding on it in the Council.⁶¹

Third, returning to procedure, there are detailed regulations of the Bundestag initiative. The initiative should encompass the essential grounds for an action,⁶² and, interestingly, also the view of MPs who do not support the action, as long as they represent at least one-quarter of the Bundestag.⁶³ Fourth, the EU Affairs Committee is responsible for drafting an action and carrying out procedures in the Court.⁶⁴ Fifth, the Bundesrat may issue its own opinion on a Bundestag's action.⁶⁵ Finally, if the deadline to raise the action falls in the period outside of the Bundestag working plan, the Basic Law (Article 45) authorises the EU Affairs Committee to file an action.⁶⁶ In the last step, the federal government immediately forwards the application to the ECJ.⁶⁷ At this point, the role of the government is complete, and unlike in other Members States, the parliament representative continues the procedure.⁶⁸

⁵⁷ § 12 (2) IntVG. This provision delegates to the Bundesrat to decide on the threshold in its Rules of Procedure. However, the regulations have not been adjusted yet. Cf. Bickenbach at 532. Hence, the decision on issuing a subsidiarity action will be taken by a majority vote (Cf. Peter Becker and Daniela Kietz, 'Zwischen Brüssel, Berlin und Karlsruhe: Bundestag und Bundesrat als Vorzeigemodell parlamentarischer Mitwirkung in der Europapolitik?' <<http://www.boell.de/downloads/parlamentarischemitwirkungineuropa.pdf> > at 20).

⁵⁸ Uerpmann-Witzack and Edenharter at 313.

⁵⁹ The Bundestag would be obliged to take a resolution about bringing an action, Cf. Ibid at 314.

⁶⁰ Melin at 672.

⁶¹ Pernice and Hindelang at 408.

⁶² § 93d (2) of Rules of Procedure.

⁶³ § 12 (1) IntVG, § 93d (3) of Rules of Procedure.

⁶⁴ § 12 (4) IntVG, § 93d (1) Rules of Procedure.

⁶⁵ § 12 (5) IntVG. This provision gives a possibility to the Bundestag to issue a reasoned opinion, if the Bundesrat has issued its own.

⁶⁶ However, a specialized committee may contradict: § 93d (4) and § 93b (2) Rules of Procedure.

⁶⁷ § 12 (3) IntVG.

⁶⁸ § 12 (4) IntVG. The ECJ Statute (Art 19 par. 1) indicates that an Agent has to represent Member States and EU institutions before the ECJ. The Agent may be assisted by an adviser or by a lawyer. Hence, as the Bundestag will not

In the UK House of Lords, a subsidiarity action first requires a report of the EU Committee, which the chamber will debate together with a resolution to pursue the action.⁶⁹ The chamber will then call on the government to bring this action before the ECJ.⁷⁰ The House of Commons' Standing Order does not directly foresee subsidiarity action.⁷¹ However, the parliament and the government adopted a Memorandum of Understanding about the implementation of Article 8 of Protocol No. 2.⁷²

The French parliament's powers to launch an action before the ECJ are regulated at the constitutional level in Article 88-6. First, Article 88-6 of the Constitution obliges the government to refer an action to the Court. Second, a resolution declaring a need for an action may be passed by a minimum of sixty members of the Assemblée, even when the parliament is not in session.⁷³ In the Assemblée, draft resolutions are admissible within a period of eight weeks after publication of the legislative act.⁷⁴ The procedure in the Sénat seems broader at the first glance:⁷⁵ any senator may initiate an action against a European act for violation of the subsidiarity principle within eight weeks following its publication,⁷⁶ but sixty senators still need to support the action.⁷⁷ The President of the Sénat transfers the resolution to the government.⁷⁸

In Belgium, the *ex post* subsidiarity scrutiny is anchored in the inter-parliamentary cooperation agreement.⁷⁹ In very general terms, it prescribes that, before any assembly initiates an action, other assemblies, within one week, may contest the competence of that parliament to proceed with the action. If this happens, the Council of State is consulted.

In Poland, the Cooperation Act and Rules of Procedure of both chambers include regulations on subsidiarity action. The Sejm Rules of Procedure indicate that the EU Affairs Committee or a group of fifteen MPs may bring a project of an opinion attached to a resolution.⁸⁰ Furthermore, the first reading of the said resolution takes place within the committee, after which there is no longer a possibility for amendments; this probably aims at safeguarding an efficient procedure. Provisions

have an independent standing before the Court, it may probably arrange with the government to choose its own agent or lawyer on the basis of §12 (4) IntVG.

⁶⁹ Companion to Standing Orders (2010), para 10.65.

⁷⁰ Ibid para 10.64.

⁷¹ Standing Orders of the House of Commons (2012).

⁷² Memorandum of Understanding on Implementing Article 8 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, House of Commons, European Scrutiny Committee, 16th Report, Session 2013-14.

⁷³ Also Article 151-11 Rules of Procedure repeats that the government receives from the President of the Assemblée nationale an action lodged by at least sixty MPs.

⁷⁴ Résolution n° 292 du 27 mai 2009 adjusted the Rules of Procedure for the subsidiarity review, Article 151-9 Rules of Procedure.

⁷⁵ Résolution du 20 décembre 2010 adjusted the Rules of Procedure for the subsidiarity review.

⁷⁶ Article 73 nonies 1-2 Rules of Procedure.

⁷⁷ Article 88-6 of French Constitution.

⁷⁸ Article 73 octies 7 Rules of Procedure.

⁷⁹ Delreux and Randour at 6.

⁸⁰ Article 148cd par 1-6, Regulamin Sejmu.

are comparable for the Senat, since the Rules of Procedure indicate that each committee may bring a project of a resolution (together with an action).⁸¹ Afterwards, the Marshall of the Senat forwards the project to the appropriate committees, including the EU Affairs Committee. To complete the proceedings, the Marshall of the Sejm or the Senat sends the resolution (with the action) from the appropriate chamber to the Prime Minister, who immediately forwards the action to the ECJ.⁸² The Marshall of the Sejm or the Senat authorizes the government to represent the chamber before the ECJ.

Spain and Luxembourg seem to impose high hurdles on subsidiarity action originating from parliamentary chambers. Despite the detailed provisions concerning the action for annulment in Spain,⁸³ the system reflects the generally weak position of the Spanish parliament, where the control of the Spanish government by the Cortes Generales relies mainly on hearings, which do not ensure much control. Accordingly, where two parliamentary fractions or one-fifth of the members of the chambers initiate an action within two weeks of the publication of an act,⁸⁴ the Joint Committee, within six weeks, discusses and decides on the initiative.⁸⁵ However, the government can dismiss the action without stating any reasons. In this instance, the Presidium of the Joint Committee, two parliamentary fractions or one-fifth of the members of the chambers may only demand that the government explains its decision during one of the Joint Committee meetings.⁸⁶

Next, the Luxembourg Chambre des Députés may launch a subsidiarity action only if its reasoned opinion is not taken into account.⁸⁷ In such circumstances, the majority of MPs in a public session adopt a motion to begin proceedings.⁸⁸ Moreover, some measures are also provided for in cases when there is no planned public debate, so that the two-month limit may be respected. In such a case, the presidium of the Chambre des Députés takes the decision⁸⁹ and invites individual members

⁸¹ Art 75e, Regulamin Senatu.

⁸² Art 17, Cooperation Act.

⁸³ Art 7, Ley 24/2009, de 22 de diciembre, de modificación de la Ley 8/1994, de 19 de mayo, por la que se regula la Comisión Mixta para la Unión Europea, para su adaptación al Tratado de Lisboa de 13 de diciembre de 2007 and the Resolución de las Mesas del Congreso de los Diputados y del Senado, de 27 de mayo de 2010, sobre reforma de la Resolución de las Mesas del Congreso de los Diputados y del Senado, de 21 de septiembre de 1995, sobre desarrollo de la Ley 8/1994, de 19 de mayo, por la que se regula la Comisión Mixta para la Unión Europea, para su adaptación a las previsiones del Tratado de Lisboa y de la Ley 24/2009.

⁸⁴ Art 7.2. Ley 24/2009, Resolución, Noveno, par. 1.

⁸⁵ The chambers may, however, decide within four weeks to take over the debate for a plenary session, Resolución, Noveno, par. 2 and par. 3. Additionally, alternative proposals for an action are also foreseen, as in the *ex ante* review. Resolución, Noveno, par. 2 in connection with Octavo par. 4-5.

⁸⁶ Art 7.3, Ley 8/1994, as amended by Ley 24/2009, Resolución, Noveno par. 4.

⁸⁷ Art 169 (6) par. 1 Reglement de Chambre des Députés.

⁸⁸ Art 169 (6) par. 2 Reglement de Chambre des Députés.

⁸⁹ Art 169 (6) par. 3 Reglement de Chambre des Députés.

to participate in the drafting of an action.⁹⁰ Consequently, the presidium informs the chamber about the decision during the next public session.⁹¹

Surprisingly, neither the Tweede Kamer nor the Eerste Kamer of the Netherlands has issued any formal regulations concerning subsidiarity actions in their respective Rules of Procedure. Likewise, the Act of Approval concerning the Lisbon Treaty does not regulate this matter. Even though it appears that the government does not want to create a legal obligation to bring actions to the ECJ, the Netherlands have announced that they will act upon a legally non-binding resolution or a decision of the chambers to bring an action for annulment on behalf of one chamber or both chambers jointly.⁹² However, it remains the responsibility parliament to decide upon the content of an action.⁹³

In 2012, the Italian parliament approved the Act on Italian participation in the EU, which significantly enhances the role of the Italian chambers in scrutinizing government action at the EU level, especially through extensive information rights and scrutiny reserve.⁹⁴ Above all, the new regulation specifies conditions for subsidiarity action. Accordingly, the government must submit actions issued by one of the chambers without any delay.⁹⁵ Most probably, however, the details of the *ex post* subsidiarity procedure will be incorporated into the Rules of Procedure of the chambers.⁹⁶

To close this overview, it is worth mentioning that the participation of regional parliaments in the *ex post* subsidiarity scrutiny is characterised by even fewer regulations, or, indeed, no regulations at all.⁹⁷ In Germany, a political agreement of the Ministerpräsidenten-Konferenz from 2005 decided that the action of one Land will be supported by all the other Länder.⁹⁸ It seems that the Bundesrat may, however, represent the interest of a Land in this matter.⁹⁹ This is important, as the right of one Land or the Länder as a group to bring an action may be seen as contrary to Article 8 of Protocol

⁹⁰ Art 169 (6) par. 3 Reglement de Chambre des Députés.

⁹¹ Ibid.

⁹² Besselink and van Mourik at 47. It will have a form of a resolution in the Tweede Kamer and ‘a decision of the chamber’ in the Eerste Kamer.

⁹³ Ibid. It is a political decision, as the government is not legally bound due to lacking provision in the Act of Approval.

⁹⁴ Art 4 and Art. 10 Legge 24 dicembre 2012, n. 234 Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea.

⁹⁵ Art 42.4 Legge 24 dicembre 2012, n. 234 Norme generali sulla partecipazione dell'Italia alla formazione e all'attuazione della normativa e delle politiche dell'Unione europea.

⁹⁶ Currently, the Rules of Procedure do not grant the Camera dei Deputati the right to initiate subsidiarity action. Similarly, the Rules of Procedure of the Senato do not address subsidiarity action at all. Cf. Camera dei Deputati, Giunta per il regolamento, 12.12.2013, p. 159.

⁹⁷ Spanish, Finnish and British laws do not provide for a role of the regional legislative bodies in the subsidiarity action.

⁹⁸ Becker and Kietz at 20.

⁹⁹ In a case where the Länder are affected by the action or omission of an EU institution in matters in which they have a legislative power, or where the federation does not have the legislative power, the federal government brings an action to the Court on the behalf of the Bundesrat. This is a general rule, not provided exclusively for subsidiarity violations, §7 (1) EUZBLG.

No. 2, if this is understood as listing an exclusive circle of applicants.¹⁰⁰ Similarly, §12 (1)-(2) IntVG provides a subsidiarity action for each of the chambers only. The additional value of this mechanism is that the Bundesrat, acting for the Länder without the intermediary government, ‘underpins the independent character of the action and corresponds with the structural difference between the action and the hitherto available possibility.’¹⁰¹ In Italy, the government may file actions to the ECJ on request of the Italian Regions and Provinces of Bolzano and Trento against illegitimate EU legislative acts concerning matters within the legislative competence of these bodies, if requested so by majority of their votes in the State-Regions Conference.¹⁰² It might be assumed that Regions and Provinces of Bolzano and Trento will consider subsidiarity violations as illegitimate EU legislative acts.

4.2 Comparison of Subsidiarity Action Provisions

Keeping in mind the differences between the national level regulations as indicated in the previous section, the following section will compare national provisions according to factors such as the number of parliamentarians required to lodge an action, and the role of the government in the transmission and representation of the interests of the national parliament before the ECJ. This analysis aims to identify the most vital aspects of national procedures and to highlight the obstacles involved in *ex post* scrutiny.

In some of the Member States, subsidiarity action is the right of a minority. In other words, the government will have to lodge an action on behalf of the parliament for a certain non-majoritarian number of the MPs. In France, the government is obliged to act when sixty members of Assemblée nationale or sixty members of the Sénat request it. Further, one-fourth of the members of the German Bundestag are needed to lodge an action in the ECJ. Accordingly, it must be underlined that leaving the initiative to the minority, which is most commonly the governmental opposition, improves the democratic control over the government during the EU decision-making process. Thanks to such a minoritarian tool, the opposition gains easier access to the scrutiny of the government. As the German Constitutional Court underlined, the subsidiarity action allows a minority ‘to assert the rights of the German Bundestag also where the latter does not wish to exercise its rights, in particular in relation to the Federal Government sustained by it.’¹⁰³

However, national legal systems only benefit if the action is appropriate, namely when detecting a subsidiarity violation. Otherwise, the ECJ may face an enormous inflow of actions from opposition

¹⁰⁰ Melin at 675.

¹⁰¹ Ibid, own translation.

¹⁰² Notes to Art 42 Legge 24 dicembre 2012, n. 234.

¹⁰³ BVerfG, 2 BvE 2/08, judgment of 30.6.2009, para 403.

parties using subsidiarity actions as a tool to fight with the government outside of the national arena, thus bringing internal conflicts to the EU level. This might be the rationale behind the Spanish scenario. Even though two parliamentary fractions or one-fifth of the members of the chambers in Spain may initiate an action within two weeks of the publication of an act, the government still decides if the action will be lodged.

Regarding the minoritarian action, it must finally be pointed out that it is difficult to imagine a minority directly submitting an action to the Court without any previous parliamentary discussion. Such a situation could contradict Article 8 of Protocol No. 2, identifying the subject eligible to bring the action. Article 8 foresees only a parliament or a chamber thereof (and the action is in fact submitted by a Member State on their behalf) as eligible to lodge an action. As the discussion within the German doctrine tries to establish, Article 8 of Protocol No. 2 seems to be against shaping the action as a minority right, as it provides for standing for national parliament and not a group of MPs or a party. Another problem is that, in order to avoid that the action will be submitted under Article 263(4) TFEU (dealing with standing for natural and legal person), it should be seen as an action of the whole parliament.¹⁰⁴

Where the subsidiarity action is designed as a majority decision, it means, in fact, that the governing party or coalition determines the fate of the action. Accordingly, the whole parliament in Denmark, Finland, Luxembourg and Poland decides upon the fate of an initiative. If the debate takes place in the plenary, it may encourage more discussion of the principle of subsidiarity or even EU affairs in general. Yet, the majoritarian decision may also diminish the possibility of bringing an action within the prescribed time. Plenary debates are also less profound than committee discussions.

In sum, both the minoritarian and majoritarian types of subsidiarity action have their advantages and disadvantages.

Subsidiarity action should raise the issue of a subsidiarity violation in a legislative proposal. It is, however, possible that the launch of the proceedings before the ECJ, especially where an action by a minority is allowed, aims rather at the contestation of a decision taken by the national government in the Council, which voted in favour of the legislative proposal. It was thus decided in all Member States analysed, with the exception of Spain, that the national government serves only as a ‘courier’ for the subsidiarity action. This shows that even though Member States might have some objections vis-à-vis reserving subsidiarity action rights to a minority, they left it to the ECJ to decide on the admissibility of an action. The Court will filter out actions purely directed against the government and those that do not raise subsidiarity violations.

¹⁰⁴ Cf. arguments raised by Uerpmann-Witzack and Edenharter at 317.

Finally, self-representation before the ECJ is directly foreseen for the German Bundestag, Czech chambers and Romania, whereas the Italian provisions rightly refer to the rules of representation.¹⁰⁵ In reality, national parliaments and governments will have to agree to representation by an agent, as foreseen by the ECJ Statute. Such representation may help national parliaments to overcome resource and expertise problems. Since governments have experience in actions for annulment proceedings, their assistance may play an essential role. The direct right of the Bundestag to have its own representative, on the one hand, is a step forward because it grants the national parliament some choice, distinguishing subsidiarity action within the action for annulment framework, but on the other hand, the ECJ Statute provisions limit this right. Another option, represented by Denmark, is that the government presents the case, but the delegation consists of participants from the Folketing, concerned governmental departments and the Ministry of Foreign Affairs, which also chairs the delegation. Thus, even if national parliaments may not have *locus standi* before the ECJ, Member States might shape their national provisions in a way that will allow the parliament more influence on the procedure.

4.3 Outcome

The more general analysis of subsidiarity action, as well as the detailed description of the national procedures for subsidiarity action, seem to suggest a causal link with the categories of national parliaments outlined by Maurer and Wessels depending on their position vis-à-vis the government in EU affairs: ‘weak’ and ‘strong’ parliaments.¹⁰⁶ Visibly, parliaments categorised as weak EU affairs scrutinisers also remain in this position with regard to subsidiarity action. The national provisions create obstacles for national parliaments (Spain, Luxembourg), regulate it in very general terms (Belgium) or do not provide for procedure at all until very recently (Italy). The decision to lodge the action by the majority vote of MPs in Denmark and Finland might have its roots in the multiparty political system of those Member States: a subsidiarity action designed as a minority action could be seen as a tool to fight against a government that does not have a single-party majority or a stable coalition. Yet, the fact that the government will lodge the action without any margin of appreciation and the Danish possibility for the parliament to be a part of the delegation before the ECJ indicate that the provisions allowing for a strong impact of Nordic national parliaments on EU affairs do not foresee any obstacles on the part of the government. Similarly, the strong German parliament, the Bundestag and to some extent the Bundesrat, have firm, constitutionally guaranteed rights to apply *ex post* subsidiarity scrutiny: minority action and the possibility of self-representation before the ECJ. Furthermore, France and the UK have

¹⁰⁵ Art 42 par. 4 Legge 24 dicembre 2012, n. 234.

¹⁰⁶ See Chapter 1, Literature review.

differentiated regulations for subsidiarity action. In France, minority action in particular is a big advantage for the French parliament. This might be a consequence of the decision of the Constitutional Council to strengthen the role of the parliament. In the case of the UK, the Memorandum of Understanding elaborates upon the subsidiarity action in the House of Lords and provides the House of Commons with a similar right. For Poland, the provisions on *ex post* scrutiny are quite detailed and similar to those on *ex ante* scrutiny. The exhaustive regulation of this procedure in Poland is a consequence of the major reform conducted in 2010 to adjust the role of the Polish parliament to the provisions of the Lisbon Treaty.

Conclusion

Summing up, this chapter has argued that Article 8 of Protocol No. 2 did not grant national parliaments independent standing before the ECJ. For the purpose of their categorisation among the different types of applicants who can bring an action of annulment in accordance to Article 263 TFEU, national parliaments can be seen as ‘indirect semi-privileged applicants.’ The notion of ‘indirect’ points to the fact that national parliaments do not bring the action themselves but via their governments, while ‘semi-privileged’ highlights that the violation touches upon only one of their institutional prerogatives, specifically supervision of the observance of the principle of subsidiarity by EU institutions. Moreover, this chapter has maintained that subsidiarity violations clearly fall within the scope of Article 263 TFEU as an infringement of an essential procedural requirement (‘procedural subsidiarity’) or as an the infringement of the Treaty (‘material subsidiarity’).

This chapter has also inquired into the design of the subsidiarity action at the national level. The procedures have been compared according to factors such as the number of parliamentarians required to lodge an action, and the role of the government in the transmission and representation of the interests of the national parliament before the ECJ. The analysis of these aspects pointed towards a causal link between the parliaments categorised as weak EU affairs scrutinisers and the national provisions: the design of the subsidiarity action in such jurisdictions does not facilitate the participation of national parliaments in the *ex post* subsidiarity review. In comparison, parliaments that are perceived as strong scrutinisers have been granted much more independence in the subsidiarity action. In other cases individual circumstances explain the position of parliament in the subsidiarity scrutiny.

The question remains whether national parliaments should have gained an independent standing before the Court. Stephen Weatherill raised an argument in favour of allowing national parliaments to bring cases before the Court on their own, as a logical consequence of the fact that ‘the problem addressed by the crafting of a novel direct role for national Parliaments in EU lawmaking lies in the

periodic failings of national executives to reflect the concerns of national Parliaments in Council negotiations.¹⁰⁷ In fact, an argument could be made that, already now, the national design of the rules on subsidiarity action, sometimes allows national parliaments a lot of independence in the subsidiarity action.

Since the *ex post* review procedure has not yet been applied, it is difficult to predict whether and how national provisions will be enforced. It remains to be seen whether national parliaments are well equipped to challenge EU legislative acts before the Court. As I have demonstrated in this chapter, Member States have offered different models for the regulation of the *ex post* subsidiarity review. Whether the subsidiarity action will evolve from a science-fiction instrument into a hard system of *ex post* control of subsidiarity, however, depends on the determination of parliaments. In comparison to *ex ante* subsidiarity review, the *ex post* scrutiny might be not that well known. However, the UK Memorandum of Understanding seems to try to provide an answer to this issue, at least in the UK.¹⁰⁸

One may claim that the new subsidiarity review mechanism by national parliaments is a sufficient safeguard for the principle of subsidiarity because it is actively used – it fulfils its function as national parliaments actively participate in the EWS. Hence, an increased legal role of the Court should not be expected. Or, as the ECJ Judge Bay Larsen pointed out, subsidiarity will be taken out of the ECJ's 'judicial toolbox' and applied where appropriate, but 'probably [will] not often be deployed as a single and separate instrument.'¹⁰⁹

Yet, it might be also argued to the contrary, that the Court will engage itself to a greater extent in subsidiarity scrutiny. Specifically, in this vein, Azoulai and Maduro argue that the Court is under much stricter public scrutiny than beforehand due to the changes introduced by the Treaty of Lisbon in the broadening of EU competences and the extension of majoritarian decision-making.¹¹⁰ This will 'require the Court to increasingly control how and when the Union exercises its competences' and 'increasingly plead for the Court to also develop a more traditional counter-majoritarian

¹⁰⁷ Weatherill, 'Better competence monitoring', 40. Because Weatherill's point raised was raised at the time of the Constitutional Treaty, the action, in Weatherill's view was to cover matters already signaled in the *ex ante* reasoned opinion procedure.

¹⁰⁸ 'We are publishing this short report in order to draw the possibility of the House challenging EU legislation on the grounds that it is in breach of the principle of subsidiarity to the attention of the Procedure Committee, Departmental Select Committees, and Members of the House.' Cf. House of Commons, European Scrutiny Committee, 16th Report, Session 2013-14, point 10.

¹⁰⁹ Lars Bay Larsen, 'The Judicial Review of the Principle of Subsidiarity at the Court of Justice of the European Union' (6th Subsidiarity Conference 18 December 2013) at 14.

¹¹⁰ Miguel Pórigues Maduro and Loïc Azoulai, 'Introduction' in M Pórigues Maduro and Loïc Azoulai (eds), *The Past and The Future of EU Law The Classics of EU Law Revisited on the 50th Anniversary of the Treaty of Rome* (Hart 2010) at XIX.

approach in reviewing the actions of the EU political process.’¹¹¹ More attention to the subsidiarity question on the part of the ECJ could be expected where the subsidiarity principle is tested via the subsidiarity action lodged by a Member State on behalf of a national parliament, especially as the subsidiarity action highlights a specific subsidiarity problem. The Court might be more willing to follow the view of national parliaments, as they are more apt than other institutions to assess the EU action against subsidiarity standards. However, this does not mean that a subsidiarity violation highlighted by one Member State will make the Court automatically decide that the EU should not act; as highlighted out by Lenaerts, ‘a necessary condition for Community action is that at least one Member State has inadequate means at its disposal for achieving the objectives of the proposed action.’¹¹² This does not work the other way round: adequate means to achieve the objectives possessed by the Member State that lodged the action do not imply that the action should be left to the national authorities.

A normative question that remains to be answered is whether we need more profound subsidiarity scrutiny by the Court, or whether the current hands-off approach is an appropriate safeguard of subsidiarity. One can agree with Toth that the Court’s powers should be restricted to uncovering a manifest error in the economic evaluation; misuse of powers or exceeding the limits of the discretion by institutions, by taking into account the statement of reasons (subsidiarity justification) and the legal basis of the act.¹¹³ The impact assessments also facilitate the examination of subsidiarity arguments with regard to the costs and benefits of EU action,¹¹⁴ as well as allowing the plaintiffs to collect information in this regard.¹¹⁵ Yet, ‘the Court is not entitled to enter the actual area of the discretion itself.’¹¹⁶ The exercise of power, especially with regard to economic policies implicates an evaluation of complex economic data and a decision concerning the appropriate action, which should be taken by the Commission and the Council. The Court lacks ‘in terms of staff, facilities and expertise to undertake necessary research to make complex economic and political judgments of this kind.’¹¹⁷ While ‘[a]djudicating subsidiarity is (...) a difficult task for any court’ because of the test at stake, for the ECJ to determine a subsidiarity breach is even more complicated than in case of other courts, as it means a different decision than that assumed by three

¹¹¹ Ibid.

¹¹² Lenaerts, ‘Subsidiarity and Community competence in the field of education’, 22.

¹¹³ Toth, ‘Is Subsidiarity Justiciable?’, 284.

¹¹⁴ While impact assessments may help to uncover manifest errors in the EU legislation, the methodology applied in the impact assessments might be questioned by the Court. See Werner Vandendruwaene, ‘The ambivalent methods of subsidiarity review’ in Marta Cartabia, Nicola Lupo and Andrea Simoncini (eds), *Democracy and subsidiarity in the EU* (Il Mulino 2013) at 396-397.

¹¹⁵ Groussot and Bogojević at 243. According to them, procedural subsidiarity does not make the Court to substitute the decision of the EU legislator, in turn it allows the Court to ‘take subsidiarity seriously.’ (at 251)

¹¹⁶ Toth, ‘Is Subsidiarity Justiciable?’, 283.

¹¹⁷ Ibid.

supporting EU institutions.¹¹⁸ In fact, by making its own assessment, the Court ‘would assume the role of the supreme legislature in the Community,’¹¹⁹ possibly deciding ‘against the will of the qualified majority of the Member States in Council and (very often also) the majority of the representatives of European citizens in Parliament.’¹²⁰ Finally, because the additional, political safeguard of the subsidiarity principle is now the hands of national parliaments in the form of the EWS, which can aptly control for the best level to adopt a piece of legislation, the subsidiarity scrutiny of the ECJ can remain of low intensity, in contrast to the period that preceded the Lisbon Treaty, when the Court was the only safeguard of subsidiarity.

¹¹⁸ Chalmers, Davies and Monti at 396.

¹¹⁹ Toth, ‘Is Subsidiarity Justiciable?’, 2.83.

¹²⁰ Fabbrini.

Chamber	Access to ECJ
Austria (Nationalrat)	submitted by the government; each MP can start the procedure; 4 others must sign it; ¹ decision taken with simple majority ²
Austria (Bundesrat)	submitted by the government; ³ any member may introduce a private member's motion calling for bringing action
Bulgaria (National Assembly)	Council of Ministers sends the action at the request of the parliament ⁴
Croatia	No dates and no majorities, government brings the action ⁵ , provisions on submission of the reasoned opinions apply to subsidiarity action ⁶
Cyprus	No measures have been considered yet ⁷
Czech Chamber of Deputies	either the EAC or a group of parliamentarians (41 deputies); the draft action has to be submitted to the president of the chamber at least 15 days before the deadline; then discussed in the plenary; the draft action should be delivered to all the deputies at least 72h before the plenary session. ⁸ The lower chamber can authorize a deputy or another 'suitable person' for representation before the ECJ ⁹ The government submits the action ¹⁰ The status of the Chamber as a party to the proceedings before the European Court of Justice and the status of the Authorized representative will remain unaffected by the elapse of the electoral term of the Chamber or by its dissolution. ¹¹

¹ Art 23h of the Constitution; § 26a(1) GO; see also § 8 of 113. Bundesgesetz über Information in EU-Angelegenheiten (EU-Informationsgesetz – EU-InfoG) on the information of the gov. to the parliament on the case

² Miklin at 5.

³ Art 23h of the Constitution; § 21a (1) GO.

⁴ Art 114 (4) of the Rules of Procedure.

⁵ Art 14 of Act on the Co-Operation of the Croatian Parliament and the Government of the Republic of Croatia in European Affairs.

⁶ Art 158 of Standing Orders.

⁷ Kalliope Agapiou-Josephides, *The Cypriot Parliament and EU Affairs* (OPAL Country Reports, 2012) at 4.

⁸ §109d(2)&(3) of Rules of Procedure of the Chamber of Deputies.

⁹ §109e(1) of Rules of Procedure of the Chamber of Deputies. See Martin Hrabálek and Alexander Strelkov, *The Czech Parliament and EU Affairs* (OPAL Country Reports, 2012) at 9.

¹⁰ §109f(2) of Rules of Procedure of the Chamber of Deputies.

¹¹ §109h of Rules of Procedure of the Chamber of Deputies.

Chamber	Access to ECJ
Czech Senate	The EAC or a group of at least 17 Senators may submit a proposal to the Senat ¹² If the Senate passes the Draft Action, it shall authorise a Senator and, as the case may be, another suitable person, to represent the Senate in proceedings before the ECJ. ¹³ President of the Senate shall deliver the Senate's resolution passing the Draft Action, along with the wording of the action, to the Government without delay; however, not later than 3 working days prior to the elapse of the period set forth in the law of the European Union; the Government shall forward it to the European Court of Justice so as to meet the set time-limit. ¹⁴ The government agent representing the Czech Republic before the European Court of Justice shall provide the persons authorised to represent the Senate under Section 119q with any and all necessary cooperation in respect of the appropriate course of action within the proceedings; nevertheless, their relation to the Government and to its opinion on the subject matter of the proceedings will remain unaffected thereby. ¹⁵
Folketing	No provisions ¹⁶
Estonia	Standing committee or fraction , ¹⁷ only the EAC is active ¹⁸ ; government issues own opinion within three weeks; ¹⁹ the government may however not decline to submit the action; the government brings the action. ²⁰
Greece	No regulation
Hungary	EAC, ²¹ no plenary, government represents ²²
Ireland	Select Committee decides; ²³ plenary with a priority, ²⁴
Italian Senato	Government submits 'without delay' ²⁵

¹² Section 119p(1), Rules of Procedure.

¹³ Section 119q(1) Rules of Procedure

¹⁴ Section 119r(1) Rules of Procedure.

¹⁵ Section 119s Rules of Procedure.

¹⁶ Mette Buskjaer Christensen, *The Danish Parliament and EU Affairs* (OPAL Country Reports, 2012) at 4.

¹⁷ 152⁷(1) Riigikogu Rules of Procedure and Internal Rules Act.

¹⁸ 152⁷(6) Riigikogu Rules of Procedure and Internal Rules Act.

¹⁹ 152⁷(5) Riigikogu Rules of Procedure and Internal Rules Act.

²⁰ 152⁷(6) Riigikogu Rules of Procedure and Internal Rules Act.

²¹ § 134/E(1) Rules of Procedure.

²² § 134/E(3) Rules of Procedure.

²³ Dáil Standing Order 107(1); Seanad Standing Order 103(1).

²⁴ Dáil Standing Order 107(3); Seanad Standing Order 103(2)(b).

²⁵ Art 42(4) Law N. 234/2012.

Chamber	Access to ECJ
Italian Camera dei Deputati	Id.
Latvian Saeima	EAC ²⁶
Lithuanian Seimas	at least 1/5 of the Members of the Seimas, the committees and the political groups; within three weeks from the publication of the legislative act in the Official Journal of the European Union; debated in the Seimas; and then in the EAC and in specialized committees (obligatory Legal Affairs Committee); final decision on the plenary sitting ²⁷
Malta	N/A
Portugal	the parliament may by means of a resolution, urge the government to lodge an appeal before the ECJ ²⁸
Romania Senate & Chamber of Deputies	parliament or the chambers should appoint an agent representing interests of state before ECJ ²⁹
Slovakia National Council	EAC or 1/5 of the Members of the National Council may request that the absolute majority of the members of the parliament decides on bringing subsidiarity action; the text of the action has to be provided by the initiator. The draft action should be submitted to the president of the parliament no later than 15 days before the deadline and distributed to the MPs at least 72h before the debate. If an action has been approved, the deputies choose their representative, who is bound by the text of the action and cannot withdraw it. The government submits the action before the ECJ and is bound by its text. The government can provide assistance to the representative. The status of the parliament as a party to the proceedings before the Court is not affected by the end of its term. ³⁰

²⁶ Janis Ikstens, *The Latvian Parliament and EU Affairs* (OPAL Country Reports, 2012) at 3.

²⁷ Art 180²⁵ Seimas Statute.

²⁸ Art 4(5) Law no. 43/2006 of 25 August 2006 as amended by Law no. 21/2012 of 17 May 2012.

²⁹ Art 15 Act on the cooperation between the Parliament and the Government in EU Affairs.

³⁰ § 58b Act of the National Council of the Slovak Republic No. 350/1996 on Rules of Procedure.

Chamber	Access to ECJ
Slovenia National Assembly	¼ of deputies; EAC ('competent committee' or a specialized committee ('working body')) may request; legal service prepares an opinion on the action; if positive it is submitted to the specialized committee which adopts and opinion with reasons for subsidiarity violation, on this basis the EAC adopts a draft decision submitted as next to the plenary; deputies may table the amendments not later than five days before the debate. If the assembly approves the draft decision, the proposer of the draft prepares an authorisation and guidelines for representation, check next by the legal service. The president of the assembly then forwards the draft decision together with the authorisation and guidelines for representation to the state attorney. ³¹

³¹ Art 154n (1-13) Rules of Procedure of the National Assembly of 2.04.2012 (consolidated version).

Chapter 5: The EWS within national political systems

Introduction

This thesis has thus far focused on the design of the Early Warning System at EU level – its scope, operation and consequences – and at national level, by analysing how national procedures accommodate the subsidiarity review. No attention has thus far been devoted to the debates and voting on the reasoned opinions in the parliamentary chambers. This aspect has also not yet been studied in the relevant literature.

In this chapter, I will hence analyse three questions regarding the interaction between national executive and legislative bodies in the EWS. First, I consider to what extent the EWS has allowed the national parliamentary chambers to act independently from their respective governments. Second, I study whether the decision to pursue subsidiarity violations through the EWS reflects the division between the parliamentary majority (coalition) and the minority (opposition), or whether there is a general unanimity between the parties on reasoned opinions. Third, I analyse to what extent the EWS permits the expression of regional interests, independently from such institutions as the Committee of Regions.¹

This chapter takes the parliamentary chambers of the UK, Germany, Poland and Belgium as case studies. Although not fully representative of all political and constitutional configurations within the EU, this will enable us to inquire into a number of relevant features of the parliamentary process. First, the Member States that are subject to comparison exhibit both federal and centralised structures. Second, these Member States contain both two-party coalitions as well as coalitions with a much more dispersed political spectrum. Third, both majoritarian (Westminster model) and consensus models of executive-legislative relations are reflected in the study. Finally, the parliamentary systems of the chosen Member States are bicameral, with the lower chambers directly elected in all four cases, as well as with variously composed upper chambers. The sample can be hence used to look into how the EWS operates in different political structures.

¹ See in Chapter 1.

Finally, this chapter provides an overview of the arguments raised in the parliamentary debates while scrutinising Commission proposals to which national parliaments later issued a reasoned opinion. The points mentioned in the debates on the redistributive character of EU policies or those concerning idiosyncratic national interests might shed some additional light on why national parliaments go beyond scrutiny of the subsidiarity principle.

1 Research Approach

I study the questions listed above by collecting data on all the issued reasoned opinions of four Member States and analysing the debates and the decision and voting patterns. The study is limited to the debates and voting in which the respective parliaments decided to issue a reasoned opinion. The countries that I selected are Belgium, Germany, Poland and the UK. While not fully representative of all possible political and constitutional configurations across Member States, the sample nonetheless allows me to cover substantial ground regarding my research questions.

1.1 Justification of the sample choice

First, the sample includes both centralised and federal constitutional systems. The national parliaments of the chosen Member States operate in federal (Germany, Belgium) or centralised Member States (Poland), while in the UK, the parliaments have been governed via the devolution principle since 1999.² The varying degree of centralisation may be expected to correlate with the degree to which regional interests are captured and reflected within the EWS where possible.

Second, the Member States I study reflect different party systems, with different levels of cross-party consensus formation. In the period of research, in the UK, Germany and Poland, the government majority was a two-party coalition, whereas in Belgium six political parties formed the parliamentary majority, reflecting a high degree of fragmentation. Notably, the current configuration of a Conservative-Liberal coalition in the UK represents a significant deviation from the traditional two-party system with a single party government that dominated post-war politics in Britain. A

² Devolution means a transfer of power to a subnational authority (Scotland, Wales or Northern Ireland) in a unitary system of government. In contrast to federalism, the powers of subnational authorities can be withdrawn by the central government at any time. See Caitríona A Carter, 'Rethinking UK Parliamentary Adaptation in EU Affairs: Devolution and Europeanisation' (2013) 19 *The Journal of Legislative Studies* 392; Robert Hazell, 'Westminster as a Three-in-One Legislature for the United Kingdom and its Devolved Territories' (2007) 13 *Journal of Legislative Studies* 254.

more fragmented political process may be expected to lead to fewer instances of consensus in actions taken under the EWS.

Third, and closely linked to the above, the sample contains representatives of both majoritarian (Westminster model) and consensus models of executive-legislative relations. In the former, the executive tends to dominate the legislative; the latter model presents a more balanced relationship.³ Dominance by the government in the relationship between the two arms of government may be expected to lead to less independence in the reasoned opinions issued by parliament.

In addition, the division between the ‘debating’ and ‘working’ chambers, as proposed by Max Weber is reflected in the selection of countries I study. Traditionally, the House of Commons is a ‘debating’ chamber, while the House of Lords represents a ‘working’ chamber. I study this distinction and its possible implications in greater detail below.

Fourth, my selection allows me to examine both elected and unelected chambers, at least with regard to upper houses. While the Lords are appointed or hereditary, the members of the Bundesrat represent regional entities. The senators in the Polish Senat are directly elected and, finally, the members of the Belgian Sénat are selected in a combination of appointment and election. The expectation is that elected chambers will act more politically, suggesting that the majority will align more with the government, while unelected chambers may act more independently. In addition, political cleavages between parties can be expected to be more prominent in elected chambers, and such conflicts may also be reflected in the views expressed on reasoned opinions under the EWS, if there is no party discipline rule (in contrast to Belgium with the high level of party discipline).⁴

1.2 Data collected on debates and votes in the EWS

The next section presents the data on the reasoned opinions issued by the different chambers in the Member States in my sample. I start with a summary of the main parliamentary features and current political situation in the UK, Germany, Poland and

³ Arend Lijphart, *Patterns of democracy: Government forms and performance in thirty-six countries* (Yale University Press 2012) at 105.

⁴ Tom Delreux and François Randour, ‘Belgium: Institutional and administrative adaptation but limited political interest’ in Claudia Heffler and others (eds), *The Palgrave Handbook of National Parliaments and the European Union* (Palgrave 2015 forthcoming).

Belgium. Next, in four tables, I present the votes of the coalition and the opposition to the Commission proposals, with the opinion of the government, if available. The content of the tables is drawn from records of debates in parliamentary committees and chambers, and explanatory memorandums issued by governments (UK), or their position, as stated in committees or plenaries (Germany, Belgium, Poland). In addition, for Germany, where the protocols, voting outcomes, and government position are not always accessible, some of the data presented here is interpreted from protocols that available or from reasoned opinions.

1.2.1 The UK

Starting with the analysis of the British parliament, since May 2010 the Conservatives have formed a coalition with the Liberal Democrats, with the Labour Party as the main opposition party in the House of Commons. As almost all ministers are members of the House of Commons, the British system is characterised by a ‘significant merging of the executive and legislative branches,’⁵ or, in other words, a ‘fused nature of the government/Commons relationship.’⁶ House of Lords members, on the contrary, are not popularly elected. The House’s members include hereditary peers (whose titles are inherited),⁷ life peers (appointed for their lifetime), and archbishops and bishops of the Church of England.⁸ The House of Lords has less party discipline, partially because it is not elected and peers are often in the twilight of their careers. Nowadays, the House of Lords functions as a ‘revising chamber with more time available and in many cases, more expertise to perform this task.’⁹ In particular, the ‘working peers’ (mainly the life peers) regularly and actively participate in select committees, working in a much more ‘non-partisan, technical, expert’ manner than members of the House of Commons.¹⁰ Life peers, formerly politicians from the House of Commons or the government, provide more ‘useful

⁵ Ian Loveland, *Constitutional law, administrative law, and human rights: a critical introduction* (Oxford University Press 2012) at 124.

⁶ Ibid at 129.

⁷ The latest most important reform of the House of Lords, House of Lord Act 1999, reduced the number of hereditary lords.

⁸ Membership as of 1.02.2013: Conservative – 213 Peers, Labour – 222 Peers, Liberal Democrat – 86 Peers, Crossbench 178, Bishops – 25 Peers, Other -32 Peers. Available at: <http://www.parliament.uk/mps-lords-and-offices/lords/lords-by-type-and-party/>.

⁹ Peter Leyland, *The Constitution of the United Kingdom: A Contextual Analysis (Constitutional Systems of the World)* (Hart 2012) at 127.

¹⁰ Dawn Oliver, ‘Reforming the United Kingdom Parliament’ in Jeffrey Jowell and Dawn Oliver (eds), *The changing constitution* (Oxford University Press 2011) at 180.

experience.’¹¹ Table 1 presents the Commission proposals that the House of Commons and House of Lords assessed as contrary to the subsidiarity principle. The government expressed its opinion on the compatibility of the proposal with the subsidiarity principle in Explanatory Memorandums, which I cite accordingly. The votes of the majority and opposition were reconstructed on the basis of debates in the chambers.¹²

The table shows that the House of Commons and the House of Lords have also issued reasoned opinions in cases where the government did not believe that the Commission proposal was in violation of subsidiarity. Moreover, in the House of Commons, in the case of the food from animal clones proposal (COM(2013)893) the views of the majority and opposition diverged, similarly to the case of the right to strike (COM(2012)130), where Labour supported the reasoned opinion not due to the subsidiarity violation, but to support the position of the trade unions.

Table 1

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition
House of Commons			
COM (2010) 371	(–) ¹³	(+)	(+) ¹⁴
COM (2011) 121	(+) ¹⁵	(+)	(+) ¹⁶

¹¹ Leyland at 138.

¹² Note that during a debate in the House of Commons on a reasoned opinion, where a question is ‘put and agreed to’ it means that the Chair has ‘put’ the question, and those present have generally shouted ‘Aye’ in response. So when the Chair then says ‘I think the Ayes have it, the Ayes have it’ no one has then challenged the decision and called a vote (known as a division). So there is no count or registration of votes in these cases. See House of Commons, Standing Orders 2013, No. 38. Similar rules apply in the House of Lords when a motion is ‘moved and agreed to’. There is no vote unless a division takes place. See House of Lords, Standing Orders 2013, No. 53.

¹³ Explanatory Memorandum submitted by HM Treasury of 17 September 2010, pt. 24. The EM of the government is in general negative, but ‘based on national sovereignty, rather than specifically on subsidiarity,’ as the government’s representative explains in the House of Commons European Committee Debate of 21.10.2010, Column 9.

¹⁴ The Labour party members supported issuing a reasoned opinion at the Committee stage. Cf. House of Commons European Committee: Investor Compensation Schemes of 21.10.2010. Column 12. The House agreed to the motion without a debate. Cf. House of Commons Hansard Debates for 25.10.2010, Column 26.

¹⁵ Explanatory Memorandum Supplement 7263/11, pt. 6.

¹⁶ The opposition was pointing out that the coalition partner – the Liberal Democrats - had a different position in its party programme on the corporate taxation (in favour). Yet, the Conservatives argued that the position of the coalition is uniform. Cf. House of Commons Hansard Debates for 11.05.2011, Column 1288.

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition
COM (2011) 452	(+) ¹⁷	(+)	(+) ¹⁸
COM (2011) 635	(-) ¹⁹	(+)	(+) ²⁰
COM (2011) 895 + COM (2011) 896	(+) ²¹	(+)	(+) ²²
COM (2012) 130	(-) ²³	(+)	(+) ²⁴
COM (2012) 617	(+) ²⁵	(+)	(+) ²⁶
COM (2012) 614	(+) ²⁷	(+)	(+) ²⁸
COM (2013) 147	(+) ²⁹	(+)	(+) ³⁰
COM (2013) 534	(+) ³¹	(+)	(+) ³²
COM (2013) 619, 618	(+) ³³	(+)	(+) ³⁴

¹⁷ Explanatory Memorandum submitted by HM Treasury of 5.09.2011, pt. 59.

¹⁸ Cf. Positions of the Labour Party Members in House of Commons Hansard Debates for 8.11.2011.

¹⁹ Explanatory Memorandum submitted by the Ministry of Justice of 31.10.2011, pt. 23. However, cf. House of Commons Hansard Debates for 07.12.2011, Column 315, where the Government agrees with the parliament on the lack of necessity of the proposal.

²⁰ Cf. House of Commons Hansard Debates for 07.12.2011, Column 322.

²¹ Cf. House of Commons Hansard Debates for 06.03.2012, Column 755. (EM not found)

²² Id.

²³ Cf. House of Commons European Committee: Right To Take Collective Action on 21.05.2012, Column 5. According to the government the ECJ's jurisprudence on the balance between fundamental freedoms and the right to strike is clear and the regulation only repeats that.

²⁴ The opposition is in favour of the reasoned opinion but due to another reason than coalition: the proposal does not safeguard the rights of trade unions sufficiently. Cf. House of Commons European Committee: Right To Take Collective Action on 21.05.2012, Column 8.

²⁵ Explanatory Memorandum submitted by the Department for Work and Pensions of 23.11.2012, pt. 14-15.

²⁶ Cf. House of Commons Hansard Debates for 18.12.2012, Column 813.

²⁷ Explanatory Memorandum submitted by the Department for Business, Innovation and Skills on 4.12.2012, stating that the UK government is 'still considering' the compatibility with subsidiarity, pt. 23. In the Government's reply to the House of Lords on 20.12.2012, the Minister agreed in this context that the Government should consider 'adherence of any legislation to the principle of subsidiarity in the light of the extensive efforts made domestically' and 'oppose any such measure strongly.'

²⁸ The opposition supports the motion, but does also criticise the government's reforms on equality in companies' boards. Cf. House of Commons Hansard Debates for 07.01.2013, Column 60.

²⁹ Explanatory Memorandum submitted by the Department for Culture, Media, Sport on 22.04.2013, points 17-18.

³⁰ The opposition supports the motion, but does also criticise the government's actions with regard to infrastructure sharing. Cf. House of Commons European Committee: Communication Networks, 20.05.2013, Column 12.

³¹ Explanatory Memorandum submitted by Home Office on 7.08.2013, Point 45.

³² House of Commons Hansard Debates for 22.11.2013, Column 265.

³³ Explanatory Memorandum submitted by the Home Office on 8.10.2013 point 19. Additional explanation in the letter from the Minister for Crime Prevention, Norman Baker MP, to Bill Cash MP, Chairman of the European Scrutiny Committee (11.11.2013).

³⁴ The opposition supports the motion, but does also criticise the government failure in response to 'legal highs.' House of Commons Hansard Debates for 11.11.2013, Column 764.

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition
COM (2013) 641	(+) ³⁵	(+)	(+) ³⁶
COM (2013) 821	(+) ³⁷	(+)	(+) ³⁸
COM (2013) 893	(+) ³⁹	(+)	(-) ⁴⁰
COM(2014) 221	(+) ⁴¹	(+)	(+) ⁴²
House of Lords			

³⁵ Explanatory Memorandum submitted by HM treasury in October 2013 states that '[t]he Government is concerned that this proposal and its scope may raise subsidiarity issues.' (point 14). In its letter to the Chairman of European Scrutiny Committee (7.11.2013), the Financial Secretary to the Treasury further explained that '[a]fter further consideration, I consider that this proposal does not comply with the principle of subsidiarity under Article 5(3) of the TEU.' This view was confirmed in the House of Commons, European Committee B, Financial Services Benchmarks debate of 28.11.2013.

³⁶ House of Commons, European Committee B, Financial Services Benchmarks, 28.11.2013, p. 6.

³⁷ The initial position of the government changed under the influence of the parliament. Explanatory Memorandum submitted by Ministry of Justice on 09.01.2014 states no subsidiarity violation (pts 18-19). The UK government states however that 'there is limited statistical quantifiable evidence of insufficient mutual trust which may rise a question about the necessity of the proposal.' In the letter of 20.01.2014 to W. Cash, Chairman of European Scrutiny Committee, C. Grayling, Secretary of State for Justice states that the proposal complies with the principle of subsidiarity (p. 4). In a later letter of 6.02.2014 to the Chairman of the European Scrutiny Committee, the government seems to agree with the opinion of the House of Commons and admits that the Commission has failed to satisfy Art. 5 of Protocol No. 2 requirement of a detailed statement on subsidiarity and proportionality (p. 2). In the House of Commons debate (House of Commons Hansard Debates for 10.02.2014) on the reasoned opinion the opposition underlined that '[t]he Government, taxed by the European Scrutiny Committee, have fallen in line with that view at the eleventh hour' (Column 671), whereas the coalition 'welcome[d] the fact that in that letter the Government have belatedly accepted that "a lack of evidence of necessity renders a proposal in breach of subsidiarity principle."' (Column 673).

³⁸ House of Commons Hansard Debates for 10.02.2014, Column 672.

³⁹ Explanatory Memorandum submitted by the Department for Environment, Food and Rural Affairs on 14.01.2014, point 6 states no subsidiarity violation. The UK government does not believe however that the proposal is necessary, 'given the absence of human health concerns associated with cloning and the protection already offered by the existing EU animal welfare and novel food regimes.' This position of the government has however changed and it supported the Committee in the view that the proposal does not meet the subsidiarity requirements. Cf. European Committee A of the House of Commons on 11.02.2014, Column 11.

⁴⁰ The reasoned opinion was agreed to without debate on the floor of the House of Commons on 12.02.2014 (Business without Debate). The reasoned opinion was discussed in the European Committee A of the House of Commons on 11.02.2014. Even though the Coalition claimed that there was 'almost' a cross party coalition on the subsidiarity issue (See further Column 11), the position presented by two Labour representatives clearly indicated that the issue should be approached at EU level (See MP Huw Irranca-Davies and MP Geraint Davies, Columns 10 and 12).

⁴¹ Explanatory Memorandum submitted by the Department for Business, Innovation and Skills on 30.04.2014, point 12. See however that the UK government had less certainty on the subsidiarity violation since the proposal have been negotiated and the only obligatory requirement would remain to attend the platform, whilst taking action would be voluntary. But in the end the UK government was in favour of sending the reasoned opinion. See: Commons Hansard Debates for 9.06.2014, Undeclared work, Columns 379-380.

⁴² The opposition agreed with issuing a reasoned opinion. House of Commons Hansard Debates, 9.06.2014, Column 377.

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition
COM (2010) 379	(-) ⁴³	(+)	(+) ⁴⁴
COM (2010) 486	(+) ⁴⁵	(+)	(+) ⁴⁶
COM (2011) 634	(+) ⁴⁷	(+)	(+) ⁴⁸
COM (2012) 617	(+) ⁴⁹	(+)	(+) ⁵⁰
COM (2012) 614	(+) ⁵¹	(+)	(+) ⁵²
COM (2013) 534	(+) ⁵³	(+)	(+) ⁵⁴
COM (2013) 618, 619	(+) ⁵⁵	(+)	(+) ⁵⁶

Notes: (+) – subsidiarity violation; (-) – no subsidiarity violation

1.2.2 Germany

German electoral law⁵⁷ combines a plurality voting system with a proportional one: half of the Bundestag members are elected directly and half from party lists.⁵⁸

⁴³ Explanatory Memorandum submitted by the Home Office on 20.07.2010, pt. 13. The UK government agrees that in regard to situations where decision of one Member States on the rights of the third country nationals affects other Member States and distorts migratory flows the subsidiarity principle is met. Same argument was raised in the House of Lords debate, See further Lords Hansard text for 20.10.2010, Column 879.

⁴⁴ Labour Party and UK Independence Party Lords were in favour of a reasoned opinion. Cf. Lords Hansard text for 20.10.2010, Column 873-875.

⁴⁵ The Explanatory Memorandum submitted by the Department for Environment, Food and Rural Affairs of 4.10.2010, pt. 7 under title ‘subsidiarity’ states that ‘the government remains unconvinced as to the merits or appropriateness of the proposal’; ‘social measures should be taken by Member States’. The debate seems to point at a clearer position of the government. Cf. Lords Hansard text for 3.11.2010, Column 1689.

⁴⁶ Lords Hansard text for 3.11.2010, Column 1684, 1686.

⁴⁷ Explanatory Memorandum submitted by the Department for Environment, Food and Rural Affairs on 17.10.2011, pt. 9. Confirmed later also in the letter of the Minister of State for Agriculture and Food to the House of Lord on 15.11.2011, EM 15054/11.

⁴⁸ Lords Hansard text for 28.11.2011, Column 91.

⁴⁹ Explanatory Memorandum submitted by the Department for Work and Pensions of 23.11.2012, pt. 14-15.

⁵⁰ Lords Hansard text for 13.12.2012, Column 406.

⁵¹ Explanatory Memorandum submitted by the Department for Business, Innovation and Skills on 4.12.2012, stating that the UK government is ‘still considering’ the compatibility with subsidiarity, pt. 23. In the Government’s reply to the House of Lords on 20.12.2012, the Minister agreed in this context that the Government should consider ‘adherence of any legislation to the principle of subsidiarity in the light of the extensive efforts made domestically’ and ‘oppose any such measure strongly’.

⁵² Lords Hansard text for 10.01.2013, Column 342, 349-350.

⁵³ Explanatory Memorandum submitted by Home Office on 7.08.2013, point 45.

⁵⁴ Lords Hansard text for 28.10.2013, Column 1404.

⁵⁵ Explanatory Memorandum submitted by the Home Office on 8.10.2013, point 19. Additional explanation in the letter from the Minister for Crime Prevention, Norman Baker MP, to Bill Cash MP, Chairman of the European Scrutiny Committee (11.11.2013).

⁵⁶ Lords Hansard Text for 11.11.2013, Column 583.

⁵⁷ In general, as provided by Art 38 I BL, members of the German Bundestag shall be elected in general, direct, free, equal and secret elections.

⁵⁸ The recent reform of the electoral law of 21.02.2013 changed the ‘Überhangmandate’ into ‘Ausgleichmandate,’ which means that for every ‘hanging mandate’ for one party, the other will be

Between 2009 and 2013 the composition of the Bundestag allowed the formation of a coalition government of the liberal-conservative Christlich Demokratische Union Deutschlands and the Christlich-Soziale Union in Bavaria (CDU/CSU) with the liberal Freie Demokratische Partei (FDP), while the social-democratic Social Democratic Party (SPD), democratic socialist Die Linke and the greens Bündnis 90/Die Grünen remained in opposition.⁵⁹ The Bundesrat consists of members of the Länder governments, thus its composition changes via elections in the Länder.⁶⁰ During the period analysed in this chapter, the SPD had a majority in the Bundesrat. Therefore, the governing majority at the central level differed from that at the level of the Länder. Each of the Länder in the Bundesrat votes through its representative ('Stimmführer') in order to avoid situations when during the vote two ministers from the same Land present two contrary votes.⁶¹ A more important issue is that the Bundesrat provides a means for the Länder to represent their territorial interests and influence federal government policy.⁶² Hence, the representatives of two different Länder that are governed by the same party may vote differently in the Bundesrat.

Table 2 illustrates, where obtainable, the position of the federal government for each of the Commission proposals where the chambers issued a reasoned opinion and the stance of the majority and opposition accordingly. I established the views of the government, the majority and the opposition on the compatibility of the proposals with subsidiarity by analysing the protocols of Bundestag and Bundesrat sittings. Closer examination of the Bundestag shows that the opinion of the government is not always available. In the Bundesrat, it seems, based on the available information⁶³ that

compensated. With the reform, voters will be better represented, as the 'Überhängmandate' differentiated the value of votes, Cf. Wahlrechtsreform (17/11819).

⁵⁹ CDU/CSU- 237 MPs, SPD - 146 MPs, FDP- 93 MPs, Die Linke - 76 MPs, Bündnis 90/Die Grünen – 68. MPs.

⁶⁰ Art 51 I Basic Law.

⁶¹ Konrad Reuter, *Praxishandbuch Bundesrat: Verfassungsrechtliche Grundlagen, Kommentar zur Geschäftsordnung, Praxis des Bundesrates* (C.F. Müller 2007) at 508.

⁶² Meg Russell, 'The territorial role of second chambers' (2001) 7 Journal of Legislative Studies 105, 110.

⁶³ Proceedings in the main chamber are recorded in the Plenarprotokoll (protocol of the plenary). For the reasoned options listed here, the protocols record rarely a substantial discussion in the plenary. Results of votes are recorded by simply stating acceptance by majority without listing votes of individual Länder consistent with §29 GO BR (see Reuter at 508). Representatives can elect to submit their votes or statements to the protocol and in some cases did so on the matters discussed here. Detailed discussions appear to take place in the committees. Proceedings in the committees of the Bundesrat are as rule confidential unless otherwise determined by vote of the committee (§37 (2) GO BR). In cases of urgency and in cases where confidentiality needs to be preserved the specific Europakammer is used §45 d GO BR. Proceedings are confidential if the Europakammer was used for

the Bundesrat has issued several reasoned opinions on proposals where the federal government did not see such a violation. Yet, as is further elaborated upon in Section 2.3, the reactions to one of the proposals show a division between different Länder, depending on their regional interests and the protection of their own prerogatives.

Table 2

Commission Proposal	Opinion of the Federal Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition
Bundestag			
COM (2012) 617	(+) ⁶⁴	(+)	(-) ⁶⁵
COM (2011) 635	(-) ⁶⁶	(+)	(+) ⁶⁷
COM (2010) 368	(?)	(+) ⁶⁸	(-) ⁶⁹
Bundesrat			
COM (2010) 368	(?)	(+) ⁷⁰	(?)
COM (2011) 654	(?)	(+) ⁷¹	(?)
COM (2011) 793	(?)	(+) ⁷²	(?)
COM (2011) 828	(?)	(+) ⁷³	(?)
COM (2011) 897	(-) ⁷⁴	(+) ⁷⁵	(?)

that reason §45 f GO BR. If the chairman of the Europakammer considers discussion unnecessary the procedure allows for a simplified Umfrageverfahren without discussion (§45 i GO BR).

⁶⁴ Deutscher Bundestag, Stenografischer Bericht, 13.12.2012, Plenarprotokoll 17/214, p. 26500.

⁶⁵ SPD and Die Linke were against. Die Grünen abstained. Deutscher Bundestag, Stenografischer Bericht, 13.12.2012, Plenarprotokoll 17/214, p. 26427.

⁶⁶ Berichtsbogen gemäß Anlage zu § 7 Absatz 1 EUZBBG und Ziffer II. 3. der Anlage zu § 9 EUZBLG, Landtag von Baden-Württemberg, Drucksache 15/848, 7.11.2011, p.6.

⁶⁷ Deutscher Bundestag, Stenografischer Bericht, 1.12.2011, Plenarprotokoll 17/146, p. 17507.

⁶⁸ Die Linke joined the coalition. Cf. Deutscher Bundestag, Stenografischer Bericht, 7.10.2010, Plenarprotokoll 17/65, p. 6871.

⁶⁹ Deutscher Bundestag, Stenografischer Bericht, 7.10.2010, Plenarprotokoll 17/65, p. 6866.

⁷⁰ See Deutscher Bundesrat, Stenografischer Bericht, 24.09.2010, Plenarprotokoll 874, p. 307-309. The representative of the Bayern government (CSU) and Baden-Württemberg government (CDU) supported issuing a reasoned opinion while the representative of Nordrhein-Westfalen government (SPD) voted against. Similarly, the Landtag von Baden-Württemberg, Drucksache 15/1323, 1.03.2012, found a subsidiarity breach.

⁷¹ No information on the votes, but the reasoned opinion has been issued.

⁷² The Thüringer Landtag dominated by the CDU found a subsidiarity breach. See Unterrichtung durch die Präsidentin des Landtags, 20.01.2012, Drucksache 5/3932. The Europakammer of the Bundesrat issued the reasoned opinion in this case. The record of voting was not public. See Bundesrat, Europakammer, 24.01.2012, Umfrage 19

⁷³ The Europakammer of the Bundesrat issued the reasoned opinion in this case. The record of voting was revealed on the motion of the State Hessen. Cf. Bundesrat, Europakammer, 7.02.2012, Umfrage 21. The CDU and FDP motion in the Hessen Landtag pointed at a violation of subsidiarity by Art 10 of the proposal. See Hessischer Landtag, 17.01.2012, Drucksache 18/5154.

⁷⁴ Stenografischer Bericht, 2.03.2012, Plenarprotokoll 893, p. 110.

⁷⁵ The opinions of regional parliaments underlined that there is a subsidiarity breach. Bayerischer Landtag, 26.01.2012, Drucksache 16/11067 on COM (2011) 897; Landtag von Baden-Württemberg, 3.02.2012, Drucksache 15-1323; Thüringer Landtag, 17.02.2012, Drucksache 5/4082 (all CDU/CSU). The SPD Minister of Rheinland-Pfalz expressed support for the Bundesrat's reasoned opinion at a later stage. Cf. Bundesrat, Stenografischer Bericht, 30.03.2012, Plenarprotokoll 895, p. 175.

Commission Proposal	Opinion of the Federal Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition
COM (2012) 10	(-) ⁷⁶	(+) ⁷⁷	(?)
COM (2012) 11	(-) ⁷⁸	(+) ⁷⁹	(?)
COM (2013) 133	(?)	(+) ⁸⁰	(?)
COM (2013) 721	(+) ⁸¹	(+) ⁸²	(?)
COM (2013) 173	(?)	(+) ⁸³	(?)

Notes: (+) – subsidiarity violation; (-) – no subsidiarity violation; (?) – position unknown

1.2.3 Poland

The Polish parliament consists of the Sejm and the Senat, which are not equal chambers: whereas Art. 95 of Polish Constitution (PC) confers the legislative competence upon both chambers, only the Sejm fulfils a controlling function over the government. Hence the doctrine often describes Polish bicameralism as unequal or incomplete, with the Senat as a chamber of reflection.⁸⁴ Nonetheless, both chambers

⁷⁶ Berichtsbogen gemäß Anlage zu § 7 Absatz 1 EUZBBG und Ziffer II. 3. der Anlage zu § 9 EUZBLG, Landtag von Baden-Württemberg, Drucksache 15/1302, 20.02.2012, p. 12.

⁷⁷ Bundesrat, Stenografischer Bericht, 30.03.2012, Plenarprotokoll 895, p. 178-180. Also the Bayerischer Landtag, 01.03.2012, Drucksache 16/11706 (CSU, SPD, FDP, Freie Wähler), Thüringer Landtag, 16.03.2012, Drucksache 5/4206, Schleswig-Holsteinischer Landtag, 12.03.2012, Drucksache 17/2413 (CDU, SPD, FDP voted in favour) found a subsidiarity breach.

⁷⁸ Berichtsbogen gemäß Anlage zu § 7 Absatz 1 EUZBBG und Ziffer II. 3. der Anlage zu § 9 EUZBLG, Landtag von Baden-Württemberg, Drucksache 15/1302, 20.02.2012, p.7.

⁷⁹ Bundesrat, Stenografischer Bericht, 30.03.2012, Plenarprotokoll 895, p. 178-180. Also Thüringer Landtag, 16.03.2012, Drucksache 5/4207; Schleswig-Holsteinischer Landtag, 07.03.2012, Drucksache 17/2350 (CDU, FDP); Bayerischer Landtag, 01.03.2012, Drucksache 16/22705 (CSU, SPD, FDP, Freie Wähler); Hessischer Landtag (Drucksache 18/5396), 13.03.2012 (motion of CDU and FDP) pointed out subsidiarity concerns and instructed their respective governments to argue for a reasoned opinion in the Bundesrat.

⁸⁰ Only the SPD Ministerpräsident of Mecklenburg-Vorpommern did directly support the reasoned opinion. Bundesrat, Stenografischer Bericht, 3.05.2013, Plenarprotokoll 909, p. 252. However, the Thüringer Landtag (Drucksache 5/5987), 19.04.2013 and the Bayerischer Landtag (Drucksache 16/16592) of 24.04.2013 (moved by CSU, Freie Wähler, Die Grünen, FDP) pointed out subsidiarity concerns and instructed their respective governments to argue for a reasoned opinion in the Bundesrat. The Thüringer Landtag underlined that even though the Land is not directly affected by the Commission proposal, the EU does not have a competence to act.

⁸¹ Berichtsbogen gemäß Anlage zu § 7 Absatz 1 EUZBBG und Ziffer II. 3. der Anlage zu § 9 EUZBLG, Landtag von Baden-Württemberg, Drucksache 15/4328, 13.11.2013, p.5.

⁸² Positions taken in the Bundesrat unknown. Bundesrat, Stenografischer Bericht, 29.11.2013, Plenarprotokoll 917, p. 551. However, the Thüringer Landtag (Drucksache 5/6905), 15.11.2013 and the Bayerischer Landtag (Drucksache 17/121), 26.11.2013 (moved by SPD, CSU, Freie Wähler, Die Grünen) pointed out subsidiarity concerns and instructed their respective governments to argue for a reasoned opinion in the Bundesrat.

⁸³ Positions unknown. Bundesrat, Stenografischer Bericht, 7.06.2013, Plenarprotokoll 910, p. 320. However, the Thüringer Landtag (Drucksache 5/6114), 17.05.2013; Landtag of Baden-Württemberg (Drucksache 15/3555), 05.06.2013; and the Bayerischer Landtag (Drucksache 16/16956), 04.06.2013 (moved by CSU, SPD, Freie Wähler, Die Grünen, FDP) pointed out subsidiarity concerns and instructed their respective governments to argue for a reasoned opinion in the Bundesrat.

⁸⁴ Cf. Leszek Garlicki, *Polskie Prawo Konstytucyjne: Zarys Wykady* (Liber 2006) at 199.

are elected in universal, equal, direct and secret ballot elections,⁸⁵ though only those to the Sejm are proportional. Since 2007, the governing coalition consists of the liberal-conservative Platforma Obywatelska (PO) and the centrist Polskie Stronnictwo Ludowe (PSL), a force reflected in the composition of the Sejm and Senat. The opposition includes the conservative Prawo i Sprawiedliwość (PiS), liberal Ruch Palikota (RP), social-democratic Sojusz Lewicy Demokratycznej (SLD) and right-wing Solidarna Polska.⁸⁶ Drawing on committee and plenary protocols and the register of votes, Table 3 reflects the views of the coalition and the opposition on Commission proposals violating the subsidiarity principle, and the position of the government when it was under the legal obligation to present it to the parliament.⁸⁷ It seems that especially the Sejm has issued reasoned opinions even though the government did not see a subsidiarity violation. Moreover, Table 3 shows a major convergence of views on subsidiarity violations between the majority and the opposition in the Sejm, and complete agreement between them in the Senat.

Table 3

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition⁸⁸
Sejm			
COM (2012) 130	(+) ⁸⁹	(+) ⁹⁰	(+)
COM (2012) 369	(-) ⁹¹	(+) ⁹²	(+)

⁸⁵ Art 96 and Art 97 PC. While it comes as natural that elections are conducted by a secret ballot, I mention it in the description of the Polish electoral system, as that of Sejm is traditionally labeled by ‘five adjectives’: universal, equal, direct, by secret ballot and proportional.

⁸⁶ Ruch Palikota and SLD have no representatives in the Senat, similarly in the period of 2007-2011.

⁸⁷ Until the new cooperation law was introduced in February 2011, there was no obligation for the government to inform the chambers of its position regarding compatibility of Commission proposals with subsidiarity principle. Art. 7 par. 3 no. 3 of Ustawa z 8.10.2010 r. o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej (Dziennik Ustaw 2010 r., nr 213, poz. 1395), in force since 13.02.2011. Hence the reasoned opinions on the following proposals: COM(2010) 537, COM(2010) 539, COM(2010) 728, COM(2010) 738, COM(2010) 799 did not demand official assessment of the government.

⁸⁸ Because the number of MPs who usually abstained or voted against in both the Sejm and Senat, even though from opposition parties, was relatively low in relations to the total number of votes and also did not represent the position of the party at stake, I qualified the reasoned opinion as taken consensually.

⁸⁹ Sejm, Sprawozdanie Stenograficzne z 14. Posiedzenia Sejmu Rzeczypospolitej, 10.05.2012, p. 252.

⁹⁰ Unanimity. Sejm, Sprawozdanie Stenograficzne z 14. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 11.05.2012, p. 323.

⁹¹ Sprawozdanie Stenograficzne z 23. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 10.10.2012, p. 8.

⁹² Unanimity. Sejm, Sprawozdanie Stenograficzne z 23. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 10.10.2012, p. 11.

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition ⁸⁸
COM (2012) 372	(-) ⁹³	(+) ⁹⁴	(+)
COM (2011) 121	(-) ⁹⁵	(+) ⁹⁶	(+)
COM (2010) 799	0 ⁹⁷	(+) ⁹⁸	(+)
COM (2011) 127	(+) ⁹⁹	(+)	(-) ¹⁰⁰
COM (2010) 537	0 ¹⁰¹	(+)	(+) ¹⁰²
COM (2010) 738	(+) ¹⁰³	(+)	(+) ¹⁰⁴
COM (2010) 728	0 ¹⁰⁵	(+)	(+) ¹⁰⁶
COM (2010) 539	0 ¹⁰⁷	(+)	(+) ¹⁰⁸
COM (2012) 614	(-) ¹⁰⁹	(+)	(-) ¹¹⁰
COM (2013) 296	(+) ¹¹¹	(+)	(+) ¹¹²
Senat			

⁹³ Sejm, Sprawozdanie Stenograficzne z 23. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 11.10.2012, p. 243.

⁹⁴ 445 in favour, 4 abstained (2 Ruch Palikota, 2 Solidarna Polska, 1 against (PSL)). Sejm, Sprawozdanie Stenograficzne z 23. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 12.10.2012, p. 331.

⁹⁵ According to the government there are transparency problems, which the directive will resolve. Cf. Pełny zapis przebiegu posiedzenia Komisji do Spraw Unii Europejskiej, 26.09.2012, p. 5.

⁹⁶ 419 in favour, 2 against (1 PiS, 1 Socjaldemokracja Polska). Sejm, Sprawozdanie Stenograficzne z 92. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 13.05.2011, p. 204.

⁹⁷ The government does not assess subsidiarity, but expressed criticism in regard to merits similar as the parliament. Cf. Biuletyn z posiedzenia Komisji do Spraw Unii Europejskiej, 18.02.2011.

⁹⁸ Unanimity. Sejm, Sprawozdanie Stenograficzne z 86. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 4.03.2011, p. 238.

⁹⁹ Komisja do Spraw Unii Europejskiej, 11.05.2011, Biuletyn nr 5035/VI.

¹⁰⁰ 379 in favour, 41 against (SLD), 3 abstained (2 PO, 1 PiS). Sejm, Sprawozdanie Stenograficzne z 93. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 27.05.2011, p. 238.

¹⁰¹ The government did not take a specific stance on subsidiarity, yet criticised the lack of precision of delegation. Komisja do Spraw Unii Europejskiej, 05.11.2010, Biuletyn Nr 4349/VI.

¹⁰² 369 in favour, 1 against (PO). Sejm, Sprawozdanie Stenograficzne z 93. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 25.11.2010, p. 135.

¹⁰³ Sejm, Sprawozdanie Stenograficzne z 84. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 3.02.2011, p. 285.

¹⁰⁴ 428 in favour, 1 against (PO), Sejm, Sprawozdanie Stenograficzne z 84. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 4.02.2011, p. 379.

¹⁰⁵ No position of the government on subsidiarity, but it seconds the EU Affairs Committee in the criticism of extensive implementation powers to the Commission. Komisja do Spraw Unii Europejskiej, 21.01.2011, p. 7.

¹⁰⁶ 418 in favour, 2 against (PiS). Sejm, Sprawozdanie Stenograficzne z 84. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 3.02.2011, p. 259.

¹⁰⁷ The government did not take a specific stance on subsidiarity, yet criticised the lack of precision of delegation. Komisja do Spraw Unii Europejskiej, 05.11.2010, Biuletyn Nr 4349/VI.

¹⁰⁸ Unanimity. Sejm, Sprawozdanie Stenograficzne z 93. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 25.11.2010, p. 135.

¹⁰⁹ Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 03.01.2013, p. 86.

¹¹⁰ 333 in favour, 60 against (3 PO, 24 Ruch Palikota, 23 SLD), 35 abstained (31 PO, 3 PSL, 1 indep.). Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 04.01.2013, p. 133.

¹¹¹ Pełny zapis przebiegu posiedzenia Komisji, Komisja do Spraw Unii Europejskiej Nr 169, p. 4.

¹¹² 448 in favour, 1 abstained (1 indep.). Sejm, Sprawozdanie Stenograficzne z 46 posiedzenia Sejmu, 26.07.2013, p. 438.

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition ⁸⁸
COM (2012) 48 + 49	(+) ¹¹³	(+)	(+) ¹¹⁴
COM (2011) 127	(+) ¹¹⁵	(+)	(+) ¹¹⁶
COM (2010) 799	(+) ¹¹⁷	(+)	(+) ¹¹⁸
COM (2012) 614	(-) ¹¹⁹	(+)	(+) ¹²⁰
COM (2010) 537	0 ¹²¹	(+)	(+) ¹²²
COM (2010) 539	0 ¹²³	(+)	(+) ¹²⁴
COM (2010) 745	0 ¹²⁵	(+)	(+) ¹²⁶
COM (2010) 379	(+) ¹²⁷	(+)	(+) ¹²⁸
COM (2010) 738	(+) ¹²⁹	(+)	(+) ¹³⁰
COM (2013) 133	(+) ¹³¹	(+)	(+) ¹³²
COM (2010) 61	(+) ¹³³	(+)	(+) ¹³⁴

Notes: (+) – subsidiarity violation; (–) – no subsidiarity violation; 0 – position not demanded

¹¹³ Cf. 19. Posiedzenie Komisji Spraw Unii Europejskiej, 13.03.2012, p. 8.

¹¹⁴ 85 in favour, 2 against (PO), 2 abstained (1 PO, 1 indep.). Sprawozdanie Stenograficzne z 8. Posiedzenia Senatu, 29.03.2012, p. 75.

¹¹⁵ Cf. Sprawozdanie Stenograficzne z 77. Posiedzenia Senatu, 26.05.2011, p. 28.

¹¹⁶ 67 in favour, 1 against (1 indep.). Sprawozdanie Stenograficzne z 77. Posiedzenia Senatu, 26.05.2011, p. 63.

¹¹⁷ Zapis stenograficzny, 135. Posiedzenie Komisji Spraw Unii Europejskiej, 8.02.2011, p. 10.

¹¹⁸ Unanimity. Sprawozdanie Stenograficzne z 71. Posiedzenia Senatu, 3.03.2011, p. 237.

¹¹⁹ The government's representative states that the position of the government is favourable to the aim of the directive, but the way to achieve this aim should be more flexible. No stance on subsidiarity. Cf. Sprawozdanie Stenograficzne z 25. Posiedzenia Senatu, 9.01.2013, p. 151.

¹²⁰ 80 in favour, 6 against (1 PO, 3 indep., 2 PSL), 3 abstained (3 PO). Sprawozdanie Stenograficzne z 25. Posiedzenia Senatu, 9.01.2013, p. 172.

¹²¹ The government did not take a specific stance on subsidiarity, yet criticised the lack of precision of delegation. Zapis stenograficzny, 122. Posiedzenie Komisji Spraw Unii Europejskiej, 16.10.2010, p. 12.

¹²² 80 in favour, 1 abstained (PiS), 1 against (PiS). Sprawozdanie Stenograficzne z 66. Posiedzenia Senatu, 25.11.2010, p. 29.

¹²³ The government did not take a specific stance on subsidiarity, yet criticised the lack of precision of delegation. Zapis stenograficzny, 122. Posiedzenie Komisji Spraw Unii Europejskiej, 16.10.2010, p. 12.

¹²⁴ Unanimity. Sprawozdanie Stenograficzne z 66. Posiedzenia Senatu, 25.11.2010, p. 29.

¹²⁵ Not specified. Zapis Stenograficzny, Wspólne posiedzenie Komisji Rolnictwa I Rozwoju Wsi oraz Komisji Spraw Unii Europejskiej, 3.02.2011.

¹²⁶ 88 in favour, 2 abstained (1 PO, 1 indep.), Sprawozdanie Stenograficzne z 70. Posiedzenia Senatu, 4.02.2011, p. 108.

¹²⁷ Zapis Stenograficzny, 117. Posiedzenie Komisji Spraw Unii Europejskiej, 6.10.2010, p. 19.

¹²⁸ 84 in favour, 1 abstained (PiS), Sprawozdanie Stenograficzne z 63. Posiedzenia Senatu, 21.10.2010, p. 149.

¹²⁹ Sprawozdanie Stenograficzne z 70. Posiedzenia Senatu, 03.02.2011, p. 73.

¹³⁰ 87 in favour, 2 abstained (1 PO, 1 indep.), Sprawozdanie stenograficzne z 70. Posiedzenia Senatu, 4.02.2011, p. 108.

¹³¹ 63. Posiedzenie Komisji Spraw Unii Europejskiej, 17.04.2013, p. 8.

¹³² 80 in favour, 2 against (1 PO, 1 ide[.]), Sprawozdanie Stenograficzne z 32. Posiedzenia Senatu, 25.04.2013, p.94.

¹³³ Sprawozdanie Stenograficzne z 53. Posiedzenia Senatu, 28.04.2010, p. 49.

¹³⁴ 80 in favour, 1 abstained (PO). Sprawozdanie stenograficzne z 53. Posiedzenia Senatu, 29.04.2010, p. 59.

1.2.4 Belgium

The Belgian federal system consists of two different types of units: three communities (Flemish, French and German) and three regions (Flanders, Wallonia and Brussels).¹³⁵ The Belgian parliamentary system reflects this architecture of the state. It represents a weak type of bicameralism, as both chambers are very similar in composition, and the second chamber has very limited powers. The 150 members of the *Chambre des Représentants* are elected directly, whereas the senators are both elected and appointed, representing the language division in Belgium. Seventy one senators are elected by a number of bodies. The Flemish electoral college elects twenty five members in direct elections; the French electoral college elects fifteen members.¹³⁶ The other senators are appointed from within the existing parliaments: the Flemish and French community parliaments appoint ten senators each, whereas the German community designates one. The other senators are co-opted: language groups in Flemish and French communities designate six and four senators each.¹³⁷ The *Chambre des Représentants* has the exclusive legislative initiative in some matters¹³⁸ and the ministers are only accountable to the lower chamber.¹³⁹ Belgian bicameralism is non-egalitarian and specialized,¹⁴⁰ in the sense that the *Sénat* cannot examine laws adopted by the *Chambre des Représentants*, except for cases where 15 senators issue a declaration of intent.

The composition of the government reflects the language group division of the *Chambre des Représentants* and its characteristically high level of political fragmentation, caused by the number of parties involved in the decision-making process and the size inequalities between these participants. Indeed, Belgium represents one of the most fragmented party systems in modern democracy.¹⁴¹ The Di Rupo government (December 2011 - May 2014) was supported by a coalition of the Dutch-speaking parties, the social-democratic *Socialistische Partij Anders* (SP.A), the liberal *Open Vlaamse Liberalen en Democraten* (Open VLD) and the Christian-

¹³⁵ Cf. Ronald L. Watts, *Comparing Federal Systems* (McGill-Queen's University Press 2008) at 43; André Lecours, 'Belgium' in Ann Griffiths (ed), *Handbook of Federal Countries* (McGill-Queen's Press-MQUP 2005) at 58. Moreover, it should be noted that Brussels Region is weaker than the two others in terms of autonomy and competences.

¹³⁶ Since 2014, the members of the *Sénat* are not elected directly anymore.

¹³⁷ Art 67 par. 1 of Belgian Constitution.

¹³⁸ Art 74 of Belgian Constitution.

¹³⁹ Art 96 and 101 of Belgian Constitution.

¹⁴⁰ Yves Lejeune, *Droit constitutionnel belge: fondements et institutions* (Larcier 2010) at 351.

¹⁴¹ Lijphart at 35.

democratic Christen-Democratisch en Vlaams (CD&V), and their French-speaking counterparts, le Parti Socialiste (PS), the conservative-liberal Mouvement Réformateur (MR) and the Centre démocrate humaniste (CDH). The biggest party in opposition was the centre right, nationalist Nieuw-Vlaamse Alliantie (N-VA). For the electoral term during the period studied here (June 2010 - May 2014), the parties that formed the government controlled a total of 96 of 150 seats in the Chambre des Représentants (with the N-VA having 27 seats during that time) and of 44 of the 71 seats of the Sénat (with the N-VA having 14 seats during that time).

Table 4 illustrates the views of the government and the votes of the majority and the opposition on Commission proposals, as interpreted on the basis of reports. First, with regard to the relationship between government and parliament, the opinion of the government was similar to that of the majority in the Chambre des Représentants. In contrast, the Sénat has thus far issued two reasoned opinions, despite the fact that the government did not find the Commission proposal contrary to the subsidiarity principle.¹⁴² Furthermore, in both the Chambre des Représentants and the Sénat there is some disagreement on subsidiarity issues between the majority and opposition, yet the latter usually only abstains, rather than objecting directly.

¹⁴² In the other case (COM(2013) 133) the position of the government was not specified.

Table 4

Commission Proposal	Opinion of the Government	Vote of the parliamentary majority/coalition	Vote of the parliamentary opposition
Chambre des Représentants			
COM(2011) 778 +779	(+) ¹⁴³	(+) ¹⁴⁴	(-) ¹⁴⁵
COM (2012) 10 + 11	(+) ¹⁴⁶	(+)	(-) ¹⁴⁷
COM (2013) 173	(+) ¹⁴⁸	(+)	(+) ¹⁴⁹
COM (2012) 130	(+) ¹⁵⁰	(+)	(-) ¹⁵¹
Sénat			
COM (2013) 133	(?)	(+/-)	(+/-) ¹⁵²
COM (2011) 635	(-) ¹⁵³	(+)	(+) ¹⁵⁴

Notes: (+) – subsidiarity violation; (-) – no subsidiarity violation

¹⁴³ Rapport fait au nom de la Commission charge des problèmes de droit commercial et économique 16.02.2012, DOC 53 2068/001, p. 11, 14.

¹⁴⁴ The coalition seem to be supported by the Greens (Ecolo Groen, p. 12-13).

¹⁴⁵ 10 in favour, 4 abstained (one of them was a N-VA MP). Rapport fait au nom de la Commission charge des problèmes de droit commercial et économique 16.02.2012, DOC 53 2068/001, p. 16. Because the MP from the biggest opposition party N-VA abstained I treat it as a lack of consensus on the reasoned opinion.

¹⁴⁶ The Minister spoke in favour of the reasoned opinion proposed by the coalition, explaining that it is similar to the negotiating position of the government. Rapport fait au nom de la Commission de la Justice, DOC 53 2145/001, p. 12.

¹⁴⁷ 8 in favour, 1 against, 2 abstentions. Presumably 2 N-VA MPs abstained, whereas an MP from Ecolo-Groen was against. Cf. Rapport fait au nom de la Commission de la Justice, DOC 53 2145/001, p. 13. Because the 2 MPs from the biggest opposition party N-VA abstained and 1 MP voted against I qualify it as a lack of consensus on the reasoned opinion.

¹⁴⁸ The Representative of the Vice-Prime Minister and of the Internal Affairs and Equality Minister advocated caution in the formulation of the reasoned opinion, as the Belgian government is a strong supporter of Europol: the reasoned opinion should not be interpreted as a sign of mistrust in the agency. It was however underlined that the government will support the 'legitimate concern' of the parliament that national parliaments should have a possibility to scrutinize Europol. Rapport fait au nom de la Commission de l'Intérieur des Affaires Générales et de la Fonction Publique, Doc 53 2910/001, 26.06.2013, p.6-7.

¹⁴⁹ Unanimity. Rapport fait au nom de la Commission de l'Intérieur des Affaires Générales et de la Fonction Publique, Doc 53 2910/001, 26.06.2013, p. 7.

¹⁵⁰ Annex to the Rapport fait au nom de la Commission des Affaires Sociales, DOC 53 2221/001, 30.05.2012, p. 8.

¹⁵¹ 10 votes in favour, 1 abstained (N-VA). Rapport fait au nom de la Commission des Affaires Sociales, DOC 53 2221/001, 30.05.2012, p. 6. Because the MP from the biggest opposition party N-VA abstained I treat it as a lack of consensus on the reasoned opinion.

¹⁵² The reasoned opinion has been issued by the Flemish Parliament, which has an equal position as the parliamentary chambers to issue a reasoned opinion on behalf of the Senate. Vlaams Parlement, 85 in favour (Open VLD, CD & V, N-VA et LDD), 8 against (2 SP.A, 6 Greens), 17 abstained (16 SP.A, 1 UF). Plenaire vergadering nr. 34 (2012-2013), 8 mei 2013, Stemming nr.3, p. 66. One of the governing parties (SP.A) voted against adoption of the reasoned opinion proposal; whereas two opposition parties Open VLD and LDD voted in favour of the adoption of the reasoned opinion.

¹⁵³ Cf. Sénat de Belgique, Rapport fait au nom de la Commission de la Justice, 6.12.2011, p.3.

¹⁵⁴ 45 in favour, 2 abstained (1 Open VLD, 1 CD&V). Séances plénières, 12.12.2011, Annales n° 5-39, p. 5. Because it was the members from the coalition that abstained I qualified the reasoned opinion as supported by the opposition. One of the abstaining members, P. Van Rompuy, pointed at the problematic differentiation between subsidiarity review and political dialogue (l'estimation de l'opportunité de la réglementation européenne) as the reason for his vote. The other member, pointed out that there is no subsidiarity violation as the proposal has a cross-border character.

2 Analysis of the data

In this section, I revisit the questions listed at the beginning of the chapter in light of the data presented above.

2.1 Independence of parliaments from the governments

First, I consider to what extent the EWS has allowed the national parliamentary chambers to act independently from their respective governments. The starting point is the oft-repeated argument that ‘it is hard to imagine that a national parliament’s majority would take a different position from that of the government’ on the issue of subsidiarity.¹⁵⁵ The results from the countries in the sample clearly show that this is not universally true. There are at least 13 instances in which parliaments took a view different from the government on the question of the subsidiarity violation.

There appear to be no clear distinctions between the different chambers analysed concerning their propensity to act independently from the government. Indeed, the analysis of the positions of the government and the parliament in the UK, Germany, Poland and Belgium shows that the division between the Westminster and consensus models seems to disappear. It is only the lower chamber of the Belgian parliament that has always followed the line of the federal government on the subsidiarity violation, which could be explained by strong party discipline. Hence, except for this case, every upper and lower chamber displays at least one instance of acting independently. Therefore, neither the model of relations between the government and legislature, nor the differences between the upper and lower chambers seem to strongly influence the independence of parliaments in the EWS.

Specifically analysing the power-sharing models, the legislatures have gained an independent voice on EU affairs from the national level perspective in both the executive-dominated Westminster model and the power-sharing consensus model. Within the Westminster model, as many as three differences between the position of the government and the parliament are visible in the case of the House of Commons,

¹⁵⁵ Franz C Mayer, ‘Competences-Reloaded-The Vertical Division of Powers in the EU and the New European Constitution’ (2005) 3 *International Journal of Constitutional Law* 493, 502. See also de Wilde stating that ‘[g]overnment frequently cajole their backbenchers into supporting them using the possible loss of a parliamentary majority as a threat. Given such a situation, it seems unlikely that parliament will send a reasoned opinion to the Commission without the consent of its government.’ Pieter de Wilde, ‘Why the Early Warning Mechanism does not Alleviate the Democratic Deficit’ OPAL Online Paper Series <http://www.opal-europe.org/index.php?option=com_content&view=article&id=76&Itemid=108> at 9.

which managed to issue reasoned opinions where the government did not see a subsidiarity violation. A very clear case concerns the Commission proposal on the right to strike:¹⁵⁶ according to the government, the proposed regulation only repeated the jurisprudence of the ECJ, which was sufficiently clear according to the government's explanatory memorandum. Nonetheless, the House of Commons issued its reasoned opinion. Moreover, the total number of opinion differences could even rise by two, because in the case of the Commission proposal on the presumption of innocence¹⁵⁷ and on food from cloned animals,¹⁵⁸ the government changed its initial position that there is no subsidiarity violation (expressed in a submitted Explanatory Memorandum) only after discussion with parliament.¹⁵⁹ However, the findings about the increased independence of the House of Commons must be qualified, as is the case, for example, with regard to the Commission proposal on investor compensation schemes.¹⁶⁰ In this case, the government, similarly to the House of Commons, took a negative stance on the Commission's proposal, but for a different reason: the government argued that the Commission's proposal infringed 'national sovereignty.' Nonetheless, the relative independence of the UK parliament under the EWS might be explained by the fact that, under the current political circumstances of coalition government, the domination of the executive is not possible to the same extent as in the classic situation of one-party government.

With regard to the consensus model, it is also surprising that, for example, the Polish or German lower chambers have gained some independence and that the position of the parliament is not automatically adjusted to that of the government with regard to subsidiarity.

There is a difference between the position of the federal government and the Bundesrat on subsidiarity issues. As Table 2 shows, where the data was available, the federal government did not find a subsidiarity breach, while the Bundesrat did. Because the Bundesrat consists of representatives of the Länder, its 'independence'

¹⁵⁶ COM(2012) 130.

¹⁵⁷ COM(2013) 821.

¹⁵⁸ COM(2013) 893.

¹⁵⁹ Hence I qualified the position of the government as stating a subsidiarity violation, even though the EM stated that there is no subsidiarity violation. In contrast to that, in case of COM(2011) 635, even though the government agreed with the House of Commons during the debate that there is a violation of necessity, a direct statement on violation of subsidiarity did not take place as in cases COM(2013) 821 and COM(2013) 897.

¹⁶⁰ COM(2010) 371

from the subsidiarity views of the federal government can result from different majorities than that of the federal government. In particular, during the period studied, the governmental majority was formed by a coalition of CDU/CSU and FDP, while the Bundesrat was dominated by the SPD.

The question remains: how can we explain the great degree of consistency of the views of the Belgian lower chamber and the Belgian government? One explanation might be that the fragmentation of the political system in Belgium forces the government to consider the coalition view already at the stage of formulating its own view on a Commission proposal. Another explanation might be the general weakness of the Belgian parliament in EU affairs and a greater obedience to the government's lead,¹⁶¹ following the general institutional weakness of the Belgian parliament¹⁶² and the fact that the coalitions adopt a 'déclaration gouvernementale' at the beginning of a period of legislature.¹⁶³ Finally, an overall strong control by the political parties on both the government and the parliament could provide an explanation for the consistency of views of the Belgian lower chamber and the government.

2.1.1 Consequences of different subsidiarity views at EU level

Some governments, like the Belgian executive, see the subsidiarity review predominantly as a prerogative of the national parliament; it is for the parliament to decide whether an EU proposal is compatible with the subsidiarity principle.¹⁶⁴ However, at the same time, the Belgian government has its own view on the subsidiarity position of EU legislative proposals.¹⁶⁵ Such a disagreement between the government and parliament on subsidiarity issues might have either positive or negative consequences within the EU arena.

Some see the independence of parliaments under the EWS as a negative issue in the further negotiation of proposals in the Council. While the House of Commons

¹⁶¹ Jan Karlas, 'National Parliamentary Control of EU Affairs: Institutional Design after Enlargement' (2012) 35 West European Politics 1095, 1102.

¹⁶² Delreux and Randour.

¹⁶³ See for example <http://premier.fgov.be/fr/d%C3%A9claration-gouvernementale>.

¹⁶⁴ Cf. Rapport fait au nom de la Commission charge des problèmes de droit commercial et économique 16.02.2012, DOC 53 2068/001, p. 11, 14. The representative of the minister stated that the subsidiarity control is a function of parliaments and did not opine compliance with subsidiarity. However, at a later stage she admitted that the introduction of single supervisory authority is not consistent with principles of subsidiarity.

¹⁶⁵ Cf. Sénat de Belgique, Rapport fait au nom de la Commission de la Justice, 6.12.2011, p.3, where the Minister favoured an introduction of the proposal, as it would ensure more protection of consumers.

European Scrutiny Committee, for example, considers its role in subsidiarity review as not only trying to protect its parliamentary sovereignty but the interests of the country, its suggestions would ‘back up’ arguments of the government in the Council.¹⁶⁶ In fact, the UK government confirms that the reasoned opinion of the parliament may ‘help strengthen the Government’s hand in negotiation with Brussels,’ yet a different position on the proposal expressed by the government and the reasoned opinion would put the former in a ‘strange position.’¹⁶⁷ According to some opposition MPs, a reasoned opinion also aims to erect a ‘significant hurdle’ for the government if it is unwilling to follow the position of parliament.¹⁶⁸

In addition, the government might also use the disagreement on subsidiarity to justify its negative position on the Commission proposal in the Council. For example, in the debate on the reasoned opinion of the Polish Sejm on the Commission regulation on clinical trials on medicinal products for human use, the government’s representative explained its stance as being in favour of the proposal, because ‘[the government] does not want to be seen as blocking all the initiatives.’¹⁶⁹ It could thus be hypothesised that a national government might be willing to shift the blame for the lack of support for a proposal onto a reasoned opinion of the national parliament.

Against this negative background, in a case where the Bundesrat issued a reasoned opinion on the Commission proposal on the award of concession contracts, the government committed itself to take into account the position of the Bundesrat in future negotiations, even though it did not find it contrary to the subsidiarity principle.¹⁷⁰

2.1.2 The ‘debating’ and ‘working’ features of parliaments in the EWS

The procedure of subsidiarity scrutiny may be an additional forum for a critical assessment of the governing majority and the government by the opposition. The

¹⁶⁶ House of Commons European Committee: Financial Services: Prudential Requirements, 14.03.2012, Column 15.

¹⁶⁷ House of Commons Hansard Debates for 08 Nov 2011, Column 212, 196.

¹⁶⁸ House of Commons European Committee: Investor Compensation Schemes, 21.10.2010, Column 12.

¹⁶⁹ In response, one of the MPs proposed that the consequence of the reasoned opinion should change the position of the government in the future. Cf. Pełny zapis przebiegu posiedzenia Komisji do Spraw Unii Europejskiej, 29.08.2012, p. 12.

¹⁷⁰ Stenografischer Bericht, 2.03.2012, Plenarprotokoll 893, p. 110.

notions of a ‘debating’ as opposed to a ‘working’ parliament illustrate this situation well.

Max Weber first applied the notion of a ‘working’ parliament in his criticism of the German Reichstag. He preferred reform in the direction of a working type of parliament, which he contrasted with parliaments described as ‘talking shops.’¹⁷¹ In the view of Weber, the parliament should have stronger control of the executive (‘officialdom’); it should possess ‘specialist knowledge’ received in the course of ‘cross-examination (under oath) by experts before a parliamentary commission with powers to summon the relevant departmental officials’ and obtain ‘official information,’ normally protected by government officials.¹⁷² Weber contrasted the Reichstag with the status of the British parliament. For Weber, the House of Commons represented the best characteristics of a working parliament: the sole existence of parliamentary inquiry kept the public constantly well informed and officials under its control. Moreover, Weber advocated the introduction of parliamentary committees to the German Reichstag for greater oversight of officials through the right to enquiry. Finally, according to Weber, a working parliament demanded ‘cooperation between specialist officials and professional politicians.’¹⁷³

Winfred Steffani elaborated on the Weber model and added the notion of the ‘debating’ parliament, describing it as ‘the most important forum of public opinion.’¹⁷⁴ According to Steffani, the debates serve to justify decisions taken, criticise the choices of the other party, to publicly scrutinise the government and to obtain information. The ‘working’ parliament, on the contrary, relies on the work of committees with its experts, who pose questions to experts representing the government.

The differences between ‘debating’ and ‘working’ chambers in general seem to diminish in the current parliamentary world.¹⁷⁵ Nonetheless the subsidiarity scrutiny

¹⁷¹ Max Weber, *Weber: political writings* (Cambridge University Press 2003) at 177-196 & 181.

¹⁷² *Ibid* at 178.

¹⁷³ *Ibid* at 182.

¹⁷⁴ Winfried Steffani, ‘Amerikanischer Kongreß und Deutscher Bundestag’ in Winfried Steffani (ed), *Parlamentarische und präsidentielle Demokratie* (Westdt. Verlag 1979) at 333 (own translation).

¹⁷⁵ Philipp Dann, ‘Looking through the federal lens: The semi-parliamentary democracy of the EU’ Jean Monnet Working Paper 5/02

<<http://www.jeanmonnetprogram.org/archive/papers/02/020501.html>> at 22. Dann who applies Weber’s notions of ‘debating’ and ‘working’ parliament to assess the EP, points out that these notions are ‘ideal types.’ Dann labels House of Commons as a debating parliament with a ‘fusion of majority party and government,’ use of the plenary by the opposition to attack the government and put forward

mechanism manages to marry the ‘working’ style, visible especially in reports high-level reports and reasoned opinions of committees, with the ‘debating’ style of scrutiny and criticism of the government during committee or plenary sittings in both chambers. This is quite evident in the debates preceding agreement on a reasoned opinion.¹⁷⁶ The opposition uses it as an opportunity to criticise the government. Especially, in the case of proposals on the Aid to the Most Deprived People or gender balance on corporate boards,¹⁷⁷ in the House of Commons, the UK Labour opposition singled out the lack of appropriate action to improve the situation in the UK by the government.¹⁷⁸ Similarly, while scrutinising this proposal, the German opposition in the Bundestag attacked the government for not paying enough attention to the social problems in the EU.¹⁷⁹

Finally, the ‘debating’ features of the Sejm and Senat, where the opposition has opportunities to criticise the coalition and the government while discussing reasoned opinions, are much less visible than in the UK. In the Sejm, even in those debates where the opposition did not support the reasoned opinion, such as on the proposal regarding the property consequences of registered partnerships, the criticism was marginal.¹⁸⁰ Hence, at least for the review of subsidiarity, the Sejm turns out to be more of a ‘working’ chamber. This is visible to an even greater degree in the Senat, with a high consistency of views on reasoned opinions between the coalition, opposition and the government; no major criticism of the government was visible.

In sum, it can be said that the notion of ‘debating’ and ‘working’ parliaments offers an additional point of view on the question of independence of national parliaments in the EWS. The central features of the ‘debating’ parliament – the debates and criticism

own proposal. The US Congress is an example for the working parliament, due to its ‘fair’ separation from the government and counterbalancing it and incompatibility of membership in the government with that of the legislature, as well as with its specialized committees. In addition, some chambers as the French lower chamber cannot even qualify under any of them.

¹⁷⁶ I refer here only to those Member States where the full stenographic protocols of the debates are accessible.

¹⁷⁷ House of Commons Hansard Debates for 18.12.2012 (especially on food banks), House of Commons Hansard Debates for 07.01.2013 (e.g. Column 60).

¹⁷⁸ Nonetheless, quite similar, but less intensive disputes might be observed in the House of Lords, despite more often described as a ‘working’ chamber. See for example, Lords Hansard text for 10 Jan 2013, Column 350.1, also the debates on EPPO or Broadcasting networks.

¹⁷⁹ Deutscher Bundestag, Stenografischer Bericht, 13.12.2012, Plenarprotokoll 17/214, p. 26502. For the opposition’s criticism of the EU politics of the German governments, see also: Deutscher Bundestag, Stenografischer Bericht, 7.10.2010, Plenarprotokoll 17/65, p. 6866.

¹⁸⁰ Sejm, Sprawozdanie Stenograficzne z 93. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 25.05.2011, p. 92.

of the government – are especially visible in the debates on the reasoned opinions, while the reasoned opinions themselves, which are often an overall assessment of the proposal, and not only of the subsidiarity question, seem to underline the ‘working’ side of the parliaments in the EWS.

2.2 Division between the coalition and opposition on subsidiarity issues

Second, I study whether the decision to pursue a subsidiarity violation through the EWS reflects divisions between the parliamentary majority (coalition) and the minority (opposition) or whether it is to a large extent a unanimous decision.

Starting with the UK, as Table 1 shows, the coalition and opposition in both Houses tend to vote together against Commission proposals and, in consequence, issue reasoned opinions. The only one case where the majority and opposition differed on the subsidiarity issue concerned the proposal on food from animal clones in the House of Commons, while in the case of the right to strike proposal, Labour supported the reasoned opinion, but in order to protect trade unions, rather than on subsidiarity grounds.

Also in Poland (Table 3), there is a striking convergence between the coalition and opposition in both the Sejm and the Senat.¹⁸¹ Nevertheless, the underlining principle is that, as long as the coalition is willing to pursue a reasoned opinion, it will be submitted to the EU institutions. The example of a reasoned opinion sponsored by one of the opposition parties (PiS) regarding the Commission proposal for the programme FISCUS, which supports cooperation between the customs and tax authorities and other parties concerned, but at the same time, safeguards the particularities of customs and taxation of Member States,¹⁸² confirms this argument. The party argued that the proposal was unlawfully based on Article 114 TFEU, which excludes the harmonisation of taxes, claiming also that it would deeply interfere in the national fiscal system.¹⁸³ The government, the coalition and some of the opposition parties rejected this argument as invalid, and hence the parliament did not send the reasoned opinion.

¹⁸¹ For the purposes of the study on the Polish parliament, I disregarded single votes of MPs or Senators that were not in favour of issuing a reasoned opinion. However, they are marked accordingly in voting results in the Table 3.

¹⁸² Proposal for a Regulation of the European Parliament and of the Council establishing an action programme for customs and taxation in the European Union for the period 2014-2020 (FISCUS) and repealing Decisions N°1482/2007/EC and N°624/2007/EC, COM (2011) 607.

¹⁸³ Sejm, Sprawozdanie Stenograficzne z 5. Posiedzenia Sejmy, 13.01.2012, p.238.

Germany (Table 2) represents a less clear case. The information on the discussions and votes in the Bundestag and the Bundesrat is much more limited than in the other cases discussed in this chapter, mainly due to the internal rules of the German chambers.¹⁸⁴ In the Bundestag, nevertheless, analysis of available information allows for the highlighting of only one case, namely the Common European Sales Law proposal, in which both sides of the Parliament unified their stance against the Commission proposal. In the case of the reasoned opinion on the Deposit Guarantee Schemes, the convergence was only partial, as only one opposition party – Die Linke – joined the coalition, explaining their support as dependent upon the content of the reasoned opinion and not the party sponsoring it.¹⁸⁵ Finally, there was no convergence in the case of the Fund for the Aid to the Most Deprived, where the reasoned opinion was not supported by the SPD or Die Linke, while the Greens abstained.

In the German Bundesrat, the vote usually takes place by raising of hands, and only the fact that there was a necessary majority is reflected in the protocol. Hence, an analysis of whether there is a convergence of views between the majority and opposition is not easy, unless one of the Länder pushes for a vote to be recorded publicly. One such vote took place on the reasoned opinion on the Commission proposal on the introduction of noise-related restrictions at Union airports.¹⁸⁶ It shows that the representatives of the Länder do not vote according to their party lines, in the sense that two Länder governed by the CDU may vote differently on the subsidiarity issue.¹⁸⁷ *A contrario*, it could be argued that the representatives vote in the Bundesrat primarily according to the interest of their respective Länder. In fact, the reasoned opinion of the whole Bundesrat specifically pointed out that Article 10 of the proposal may confer upon the Commission a direct influence on all planned operating restrictions in airports in Member States and allow it to demand changes to these restrictions.¹⁸⁸ Interestingly, the Länder voting in favour of issuing the reasoned opinions especially included those with big airports on their territory, for example Hessen, which contains Frankfurt Airport. Moreover, an important political issue in

¹⁸⁴ § 69 BT Geschäftsordnung, § 34, § 37 BR Geschäftsordnung.

¹⁸⁵ Deutscher Bundestag, Stenografischer Bericht, 7.10.2010, Plenarprotokoll 17/65, p. 6868.

¹⁸⁶ COM(2011) 828.

¹⁸⁷ See regarding COM(2011) 828, Bundesrat, Europakammer, Umfrage 21, 7.02.2012, Abstimmungsverhalten der Länder zu BR-Drucksache 799/1/11, Ziffer 1.

¹⁸⁸ German Bundesrat, Reasoned opinion of 7.02.2012 on COM(2011) 828.

Hessen was the night flight limits imposed by the Hessen Administrative Court and confirmed by the Federal Administrative Court in Leipzig.¹⁸⁹

Finally, in the Belgian Sénat (Table 4) two possibilities are visible. First, one reasoned opinion was almost unanimous, while with regard to the other, there was no common position within the governing coalition. The opposition parties in the Chambre des Représentants usually abstain. Yet, it seems that most of the criticism concerns the formal aspects of reasoned opinions.

To sum up, there is a major convergence of views between the political parties with regard to subsidiarity violations regardless of the fragmentation of the domestic party system. Only in the Bundestag, where data is admittedly limited, does it seem hard to argue for convergence on the subsidiarity issue between the majority and opposition parties, let alone convergence by the various parties themselves. Rather, the interest of the Land involved may lead it to a vote in favour of a reasoned opinion, instead of following a party line. In the next two points, I will elaborate on the cases where there was a discrepancy between positions adopted by the coalition and opposition in issuing the reasoned opinions. In this regard, I will look at the party positions on European integration and the right-left and socioeconomic cleavage.

2.2.1 Party positions on EU integration

The last aspect of this study is the position of the citizens in the chosen Member States concerning the EU. In 2011 the question ‘generally speaking, do you think that (your country’s) membership of the European Community (Common Market) is...?’ was replied to by selecting the statement ‘a good thing’ in Belgium (65%), Germany (54%), Poland (53%) and in the UK (26%).¹⁹⁰ Against this background, it will be analysed whether the cleavage between the majority and opposition in voting on the reasoned opinions can be explained by their positions concerning EU integration.

The party divide on European integration is uneven in the four Member States under review. However, very often all political parties share the negative assessment of the compatibility of a Commission proposal with the subsidiarity principle. This leads to a conclusion that parties that have a generally positive approach to European

¹⁸⁹ BVerwG 4 C 8.09, judgment of 4 April 2012.

¹⁹⁰ See results from the Eurobarometer available at http://ec.europa.eu/public_opinion/cf/showchart_column.cfm?keyID=5&nationID=1,3,24,15,&startdate=2011.05&enddate=2011.05

integration also do not always see the need for the EU to act. Nonetheless, only in one case did an opposition party underline that one of the reasons why it did not support the reasoned opinion was the message that such an action sends to Brussels. Specifically, a Member of the Belgian pro-European N-VA in the *Chambre des Représentants* stated that issuing the reasoned opinion creates a negative image of Belgium at the European level, which should be avoided, in particular, as there would not be enough opinions from national parliaments for the Commission to change its proposal in this case.¹⁹¹ In other cases, the lack of consent of the opposition to the subsidiarity review rather concerned its formal character, namely that it was not an appropriate tool in the circumstances in question.¹⁹²

In the committees of the Belgian *Chambre des Représentants*, which may issue binding reasoned opinions in the name of the whole chamber, the relations between political parties differ to the extent that the opposition (N-VA and Ecolo Groen) usually abstains, except for one case, which ended with a vote against the proposal. Their arguments are, however, mostly formal; for example the opposition MPs who abstained from voting in favour of a reasoned opinion on right to strike proposal also saw a violation of the subsidiarity principle; yet, they favoured a shorter version of the reasoned opinion.¹⁹³

Notwithstanding these marginal cases, even those parties who generally sympathise with European integration are often in favour of the submission of reasoned opinions to the Commission. Hence, the political party's particular approach to the EU does not seem to impact on how the subsidiarity review is seen at national level.

Yet, a pro-European approach seems to be more visible in the general participation of national parliaments in the EWS. In my sample, the chambers of the Belgian parliaments are much less active than the UK parliament. However, the German and Polish parliaments are rather closer to the UK than the Belgian parliament in their

¹⁹¹ Cf. Rapport fait au nom de la Commission charge des problèmes de droit commercial et économique 16.02.2012, DOC 53 2068/001, p. 16.

¹⁹² Cf. Debates in the Bundestag and Bundesrat on the proposal COM(2010) 368.

¹⁹³ Rapport fait au nom de la Commission des Affaires Sociales, DOC 53 2221/001, 30.05.2012, p. 6. Similarly, some opposition MPs in the Bundestag perceive reasoned opinions as an ultimate tool, which hence should be used only in exceptional circumstances. For example, in the discussion on the Deposit Guarantee Schemes, the SPD and die Grünen approved a subsidiarity violation, but did not think that issuing of the reasoned opinion is an appropriate tool. Deutscher Bundestag, Stenografischer Bericht, 7.10.2010, Plenarprotokoll 17/65, p. 6866.

activity within the subsidiarity review procedure, even though they are much more pro-European than the UK in general.¹⁹⁴

2.2.2 The right-left divide and socioeconomic cleavage

Despite the fact that the political party views on European integration in the cases discussed do not have a major impact upon the subsidiarity review mechanism, their positions on specific policy issues tend to play a more important role.¹⁹⁵ That is to say, the cases where opinions whether to issue a reasoned opinion differed across the parties prove that the members of lower and upper chambers tend to follow their general party programme, rather than the specific party stance on EU affairs. The cleavages between the majority and the opposition in the parliaments from my sample have a two-fold character: a right-left division and a socioeconomic one.

The examples from the Polish Sejm depict the traditional right-left cleavage. First, the social-democrats did not support the reasoned opinion on the Commission proposal on registered partnerships, as ‘it is in line with the plans or program of the SLD that supports the legalisation of partnerships in Poland.’¹⁹⁶ Second, the majority of the governing coalition and the conservative MPs of the opposition (PiS, SP) voted in favour of the reasoned opinion, outlining a violation of subsidiarity by the Commission’s proposal that introduced more women to non-executive boards of companies, whereas the liberal opposition (SLD, Ruch Palikota) voted against it, underlining the need for gender balance and the lack of national means that can safeguard this interest.¹⁹⁷ Interestingly, a reasonable number of the governing majority MPs abstained,¹⁹⁸ however, enough MPs still supported the reasoned opinion, which the chamber later sent to the EU institutions.

¹⁹⁴ The finding that higher levels of political contestation over EU integration increase the chance of a reasoned opinion submission has been recently confirmed by a comprehensive study by Gattermann and Heftler, at 17.

¹⁹⁵ This seems in contrast with the study by Gattermann and Heftler, who argue that ‘the traditional conflict along the left-right lines ‘hardly matters for the subsidiarity review.’ (at 17). Indeed, in the cases presented in this chapter reasoned opinions have been issued and hence in this sense the right-left cleavage did not seem to have an impact on the number of issued reasoned opinions. Yet, only an analysis of the parliamentary debates shows that arguments along right-left division are in fact invoked against EU legislative proposals.

¹⁹⁶ Own translation. Sejm, Sprawozdanie Stenograficzne z 93. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 25.05.2011, p. 92.

¹⁹⁷ Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 03.01.2013, p. 83.

¹⁹⁸ Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 04.01.2013, p. 133.

The socioeconomic cleavage is visible in the Bundestag debate on the Commission proposal on the Fund for the Aid to the Most Deprived Persons. The social democrats did not support the reasoned opinion proposed by the coalition, and voted against sending it to the EU institutions. As one of the SPD MPs underlined, ‘[i]t was always a matter for the social-democrats, to support the ideas and actions in science and society that aim at strengthening of the principles of sustainability and solidarity. In securing the nutrition, we see a safeguard of basic human right.’¹⁹⁹ Die Linke sided with the SPD, and in a similar vein, underlined its party position, which supports social rights.²⁰⁰ Die Grünen also saw the Commission proposal as constituting support for social solidarity, yet abstained, due to the administrative costs connected with the creation of the fund.²⁰¹

The only direct division between the coalition and the opposition in the UK parliament concerned the Commission proposal on the food from cloned animals. While the coalition argued that the proposal is not necessary, the relevant EU legislation already exists and there is no potential risk to human health or risk of commercial animal cloning, the Labour opposition MPs underlined that such issues as consumers protection, animal health and welfare, and food safety – uncovered by the horsemeat scandal in the UK – are best dealt at the EU level.²⁰²

Finally, another possibility is that the party may support the reasoned opinion, but still underline its party preference. For example, the opposition in the House of Commons was in favour of the reasoned opinion on the Commission proposal on the right to strike, but for another reason than the coalition: the Commission right to strike proposal did not safeguard the rights of trade unions to a sufficient degree.²⁰³

2.3 Reflection of regional interests

Third, I analyse to what extent the EWS permits the expression of regional interests independently of national governments. This is against the background of the fact

¹⁹⁹ Own translation. Deutscher Bundestag, Stenografischer Bericht, 13.12.2012, Plenarprotokoll 17/214, p. 26503.

²⁰⁰ Ibid at 26504.

²⁰¹ Ibid at 26505.

²⁰² House of Commons European Committee, Food from Animal Clones, 11.02.2014, Column 10 and 11.

²⁰³ Cf. House of Commons European Committee: Right To Take Collective Action on 21.05.2012, Column 8.

that, in particular the German Länder, saw the subsidiarity mechanism as ‘enhanced protection against interference with their own legislative and enforcement powers.’²⁰⁴

2.3.1 Germany

In Germany, not only the reasoned opinions of the Bundesrat should be explored, but also instructions issued by Länder Landtage,²⁰⁵ which take resolutions on Commission proposals and instruct their respective governments to argue for a reasoned opinion in the Bundesrat.²⁰⁶ Yet, the competences that the Länder highlight and that are later expressed in the Bundesrat do not necessarily concern only the infringement of their own competences by a Commission proposal. The reasoned opinions issued in the Bundesrat can reflect both encroachment at federal and at Länder levels of activity.

Hence, as some examples show, the focus is often on the protection of a federal competence. For instance, the Thüringer Landtag and the Bayerischer Landtag, instructed their governments to highlight subsidiarity issues and influence the decision of the Bundesrat in that direction, as the Commission proposal on the EU Agency for Law Enforcement Cooperation and Training,²⁰⁷ affected the national training of police officers, which falls within the ‘national sovereignty’ of the Member States.²⁰⁸ This view was later reflected in the opinion of the Bundesrat.²⁰⁹ In fact, the Landtage, which instruct their ministers in the Bundesrat, underlined that even though the Land is not directly affected by the Commission proposal, the EU does not have a competence to act.²¹⁰

Another example, on the Data Protection package, shows that the competences of both the Länder and the federal state may be violated by the Commission’s proposals.

²⁰⁴ von Bogdandy and Bast at 276, see fn. 7 there.

²⁰⁵ Available on Regipex.

²⁰⁶ The opinions of Landtage may influence the position of the regional government during its vote in the Bundesrat. Yet, in principle the ministers in the Bundesrat are not bound by these opinions due to the constitutional principle of own political responsibility of the executives (‘Prinzip der Eigenverantwortung der Regierung’). Nonetheless, the government will have to explain why it did not follow the recommendation of the Landtag. So far only in Baden-Württemberg the Landtag may issue a decision binding on the government, whilst in Bavaria and Saxony the state governments committed to take into account the position of the parliament in cases of a subsidiarity violation. See Regions at 55.

²⁰⁷ Flemish Parliament, Reasoned opinion of 26.06.2013 on COM(2013) 173, Document 2038(2012-20, 13)- No.2.

²⁰⁸ Thüringer Landtag, Unterrichtung, Drucksache 5/6114, Bayerischer Landtag (Drucksache 16/16945).

²⁰⁹ German Bundesrat, Reasoned opinion of 7.6.2013 on COM(2013) 173, 346/13, point 3.

²¹⁰ Thüringer Landtag on COM(2013) 133 (Drucksache 5/5987), 19.04.2013.

The Landtage argued that Germany offers a much higher level of protection than the EU proposal, a point later reflected in the reasoned opinion of the Bundesrat.²¹¹ Moreover, the Bundesrat argued that the Commission's Data Protection package proposal extends EU substantive competences in a way 'particularly detrimental to the sovereignty of the federal states (Länder) in matters pertaining to the police.'²¹² Similarly, with regard to the Commission proposal amending the Deposit Guarantee Schemes, which already set the coverage level of deposits at €100,000, but now required all banks to join the Deposit Guarantee Schemes, the Bundesrat stressed the specificities of the German banking system, connected to its regional and local dimensions. In the view of the Bundesrat, the proposed directive especially affected these banks, which already participated in the institutional warranties scheme (institutions provide security to associated institutions), and which have strong roots in the regions.²¹³ In the same case, members of the Bundestag emphasised that 'Europe has to take into account the inherent structures and specificities of Member States.'²¹⁴ Finally, the German Bundestag negatively opined on the draft directive, which aimed at introducing clear legal rules governing the award of concessions contracts.²¹⁵ The chamber maintained that, in particular, the provisions of the proposal could infringe on the competence of the Länder to grant service concessions for services of general economic interest. Specifically, the proposal affected the exclusive competence of the Länder regarding emergency services, a vital guarantee of internal security, and may thus violate the principle of regional and local self-administration.²¹⁶

In sum, the reasoned opinions of the Bundesrat are not aimed only at the protection of regional competences, but also that of federal competences, against EU intervention.

²¹¹ See especially Hessischer Landtag, opinion of 13.03.2012 on COM(2012) 11, Drucksache 18/5396, point 1 and 2; German Bundesrat, Reasoned opinion of 30.03.2012 on COM(2012) 11, 52/12, point 2 and 10.

²¹² Reasoned opinion of the German Bundesrat of 30.3.2012 on COM(2012) 10 final, p. 4. Cf. Bundesrat, 895. Sitzung, Plenarprotokoll, 30. 12. 2012, pp. 175-180.

²¹³ German Bundesrat, Reasoned opinion of 24.09.2010, COM(2010) 368 final, pt 2. Unexpectedly, the discussion in the Bundesrat invoked the protection of national identities as guaranteed in Art. 4 TUE. Cf. Bundesrat, Stenografischer Bericht of 24.09.2010, Erklärung von Minister Prof. Dr. W. Reinhart (Baden-Württemberg), p. 330.

²¹⁴ Bundestag, Plenarprotokoll of 7.10.2010, p. 6865 (own translation).

²¹⁵ Proposal for a Directive of the European Parliament and of the Council on the award of concession contracts, COM(2011) 897 final.

²¹⁶ German Bundesrat, Reasoned opinion of 02.03. 2012 on COM(2011) 897, pt 10. Interestingly, the Bundesrat again relied on the protection of national identities as guaranteed in Art 4 TUE.

2.3.2 Belgium

In federal Belgium, the Flemish parliament issued its own reasoned opinion, which seems to show that the EWS may give more voice to regional issues. Specifically, the Flemish parliament issued a reasoned opinion on the Commission proposal for ‘a framework for maritime spatial planning and integrated coastal management,’ taking stock of its right under Declaration No. 51 to the Lisbon Treaty by the Kingdom of Belgium on national parliaments.²¹⁷ Indeed, Declaration No. 51 foresees that, in accordance with Belgian constitutional law, the parliamentary assemblies of the communities and the regions act should be conceived of as ‘components of the national parliamentary system or chambers of the national Parliament.’²¹⁸ The fact that this mechanism was used only once seems to show that interests of the regional entities do not play much of a role in the subsidiarity scrutiny procedure. This may not be surprising, taking into account the pro-European consensus among Belgian political parties. Another explanation might be the fact that the EU affairs administrative units in Brussels and Wallonia are much smaller than that of the Flemish parliament.

2.3.3 The UK

Finally, the application of the EWS in the UK, governed by the devolution principle, has provided some protection to the prerogatives of the devolved Welsh and Scottish territories, as for example, in the case of two draft directives regarding public procurement and procurement by public entities, which aimed at establishing a single national authority in charge of procurement oversight and empowered with reviewing the decisions of contracting entities.²¹⁹ Hence, in the view of the House of Commons, the Commission proposal, by obligating the UK to create a single body merging ‘administrative, regulatory and judicial functions, with the power to take over, in

²¹⁷ It is worth noting that Brussels and Wallonia have no access to the sea, and that this competence is regionalized.

²¹⁸ On Declaration No. 51 and its impact on the EWS see further Maria Romaniello, ‘Beyond the Constitutional ‘bicameral blueprint’: Europeanisation and national identities in Belgium’ in Marta Cartabia, Nicola Lupo and Andrea Simoncini (eds), *Democracy and subsidiarity in the EU* (Il Mulino 2013) at 304-308.

²¹⁹ House of Commons, Reasoned opinion of 6.03.2012 on COM(2011) 895, point 18 and the annex, which refers to and annexes the subsidiarity reports from the Welsh Assembly and the Scottish Parliament. See Article 84 of the proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, COM(2011) 895 and Article 93 of the Proposal for a Directive of the European Parliament and of the Council on public procurement, COM(2011) 896.

particular cases, the jurisdiction which currently rests, in England and Wales and Northern Ireland, with the High Court', did not pay 'respect [to] the diversity of legal traditions among Member States.'²²⁰

Similarly, in the view of the House of Commons, the EPPO ignores 'the deliberate separation of decisions on investigation from decisions to prosecute in England and Wales, which is a long-standing element of (...) system.'²²¹ In addition, the powers to conduct direct prosecutions create a situation not possible under the current legal system in England and Wales, but only in Scotland.

Finally, the opinion of the Scottish parliament has been directly taken into account in the reasoned opinion of the House of Commons on the Commission proposal on strengthening of the principle of the presumption of innocence.²²² The Scottish parliament questioned the necessity of EU action to ensure that the judicial authorities cooperate, by highlighting that there was 'no evidence of any reluctance in co-operation between other Member States and Scottish authorities.'²²³

Conclusion

This chapter tackled three questions regarding the interaction of executive and legislative bodies in the EWS. In this regard, I studied a sample of four Member States, namely the UK, Germany, Poland and Belgium. Despite the fact that this sample is not fully representative of all possible political and constitutional configurations within the EU, it allowed an inquiry into a number of significant fields. First, the chosen Member States had federal and centralised structures. Second, the Member States in question had both two-party coalitions, as well a much more dispersed political spectrum. Third, both majoritarian (Westminster model) and consensus models of executive-legislative relations were taken into account. Finally, the study took into account both the lower chambers, which are in all four cases directly elected, as well as the variously composed upper chambers.

²²⁰ Similarly, the reasoned opinion of the House of Commons on the EPPO refers to and contains also a report from the Scottish parliament. See UK House of Commons, Reasoned opinion of 22.10.2013 on COM(2013) 534, point 15 and 21 and the annex. Similar arguments raised in the House of Commons debate of 6.03.2012, Column 750.

²²¹ House of Commons EPPO debate, See MP from Berwick-upon-Tweed.

²²² COM(2013) 821.

²²³ Reasoned opinion of the House of Commons, Reasoned opinion of 10.02.2014 on COM(2013) 821, point 18.

The analysis of the data collected on the debates and votes on reasoned opinions in the eight parliamentary chambers provided some preliminary indications with regard to the questions posed in this chapter. First was *the question whether the EWS increases the independence of legislature vis-à-vis the executive*. The study of activity in the Member States showed that, in a number of cases, a reasoned opinion was issued, even though the government did not find a subsidiarity violation.²²⁴ This was the case in both the executive-dominated Westminster model and the power-sharing consensus model. Only the lower chamber of the Belgian parliament always followed the line of the federal government on subsidiarity violations, which was explained by its generally weak position vis-à-vis the government in EU affairs. Also, the upper-lower chambers cleavage did not seem to have much effect in this respect; each of the upper chambers took part in issuing reasoned opinions despite the acquiescence of the executive. This may not be a surprise, taking into account the fact that the upper chambers tend not to have such strong political links to the executive as the lower chambers.

On this point, I have also highlighted that the overriding of the government by parliament concerning subsidiarity issues may have negative consequences for the further negotiations of Commission proposals (it might be a significant hurdle for the government) or might constitute an instrument to justify the government's negative position vis-à-vis the Commission proposal. In addition, I have pointed out that the EWS has combined the 'working' and 'debating' features of parliaments. Debates on the reasoned opinions were often used to criticise the governments, with the reasoned opinions on Commission proposals going beyond the strict scrutiny of subsidiarity and assessing all the legal elements of Commission proposals uncovered the 'working' character of parliaments under the EWS.

The differences between the two-party coalitions and more dispersed political systems played a role in the *assessment of the voting patterns on reasoned opinions*. In the two-party coalitions systems, in the UK and in Polish chambers, as well as in the German Bundestag, we can note a convergence of views on subsidiarity. A similar assessment with regard to the Bundesrat is not easy due to lack of data, but it is quite clear that the members of the Bundesrat do not follow the federal party line and there

²²⁴ Possibly the number of cases where the parliament and the government agree could have been higher if the study included also cases in which national parliaments at stake did not issue reasoned opinions.

is no cross-party convergence on subsidiarity issues. Furthermore, the multiparty system of Belgium has an impact on the lack of convergence of views on issuing reasoned opinions, especially in the lower chamber. The party positions on EU integration may, however, have an impact on the votes of on the reasoned opinions in the Belgian lower chambers, where MPs often abstain from a vote on a reasoned opinion. Finally, against the background of the large extent of agreement between the majority and opposition on the need to issue a reasoned opinion, the cases of a disagreement show a clear right-left and socioeconomic cleavage. Matters such as the position of women in society, and the rights of registered partnerships, help for the most deprived or food from cloned animals, and to some extent also the protection of the right to strike on which political parties usually disagree, made some parties put on hold their vote in favour of a reasoned opinion.

Finally, I analysed to what extent the EWS permits the expression of regional interests, independently from institutions such as the Committee of Regions. In fact, as expected, the protection of the prerogatives of the Länder played an important role in the reasoned opinions of the German Bundesrat. However, it is important to point out that the members of the Bundesrat, often following the instructions of the state Landtage, also raised questions of federal importance. In sum, the reasoned opinions reflect the protection of both regional as well as federal matters. In Belgium, the Flemish parliament has also made use of its prerogative, in accordance with Declaration No. 51, to issue a reasoned opinion. This, *per se* can be seen as a reflection of a regional matter in the EWS. Finally, in the UK, the Scottish parliament and the Welsh Assembly have scrutinised Commission proposals. Although the number of cases in which the reports of these devoluted entities were taken into account in the reasoned opinions of the House of Commons is low, to some extent at least these entities managed to raise issues significant for them.

Outlook

The study of the debates that led to issuing a reasoned opinion highlighted two main ideas on why a reasoned opinion against a proposal was necessary. While these arguments are not always expressly stated in the reasoned opinions, they may nonetheless explain why national parliaments participated in the EWS. As argued by Vlad Constantinesco, while the new powers of national parliaments in the EWS have

the advantage of granting additional validation to EU legislative acts, they also brings some risks. Constantinesco claimed that under the cover of the subsidiarity principle, other motives, such as for example protection of the national situation or national production will be defended. This may lead to ‘instrumentalization of this principle for other purposes than its own, and its use by pressure groups, passed on by parliaments, which are more concerned with defending national positions than fighting against excessive EU legislation.’²²⁵

Indeed, the risk of cloaking other motives underneath alleged violations of the principle of subsidiarity, especially those of protectionism, is visible in the reasoned opinions. The two points raised by parliamentarians concern the redistributive character of EU policies and the idiosyncratic interests of Member States, which speak against Commission proposals.

The redistributive character of EU policies

Current EU policies and the dominating majoritarian form of decision-making bring forth redistributive effects that exceed the notion of the European Union as a regulatory authority.²²⁶ National parliaments strongly react in the committee or plenary debates on Commission proposals, even if this is not directly voiced in the reasoned opinions that are issued.²²⁷

A clear example of this problem is a series of Commission proposals regarding the distribution of food products to the most deprived persons in the Union, which aimed at formalising CAP funds to purchase goods not only from intervention stocks but also on the open market.²²⁸ While discussing the Commission’s initiatives, some of the Lords stressed the fact that the UK has not benefitted from the aid in recent years, with its contribution to the EU budget later being used for this scheme.²²⁹ The latest proposal in this series, creating a Fund for European Aid to the Most Deprived,²³⁰ designed to promote social cohesion and no longer based on agricultural policy, makes the participation of the Member States obligatory. It imposed a requirement on

²²⁵ Vlad Constantinesco, ‘Les compétences et le principe de subsidiarité’ (2005) *Revue trimestrielle de droit européen* 305 (own translation).

²²⁶ Miguel Poiars Maduro, *A New governance for the European Union and the Euro: democracy and justice* (European University Institute 2012) at 18.

²²⁷ House of Commons Debate of 11.05.2011, Column 1292.

²²⁸ COM(2010) 486 and COM(2011) 634.

²²⁹ House of Lords Debate of 3.11.2010, Column 1693 and of 28.11.2011, Column 88.

²³⁰ COM(2012) 617.

Member States to set up a single national programme to implement the scheme, where the EU will contribute 85%. As was underlined in the House of Lords by one of the Ministers, '[not] only is this fund inconsistent with subsidiarity, it will use resources that would be better deployed at national or local level. It is worth pointing out that if this fund were removed from the proposals, the UK could argue for an equivalent reduction of €2.5 billion from the EU budget over the seven years of the multiannual financial framework.'²³¹ The Lords did not comment on this statement, and focused more on the administrative burden connected to the operation of the Fund in its reasoned opinion;²³² further, the redistributive character of the proposal might have influenced the attitude of the House towards the Commission proposal.

With regard to the same proposal, the coalition in the Bundestag also raised analogous objections about the financing of the Fund. According to the Bundestag, the €2.5 billion might have been used in the framework of the existing Social Fund, which would have also provided for a democratic supervision by national parliaments.²³³ Finally, in the same vein, some of the Polish senators raised concern about the methods of the division of means for specific actions in CAP, a significant issue for Poland.²³⁴

Idiosyncratic national interest

The members of chambers are often very straightforward in stating why a reasoned opinion should be issued. As one of the MPs in the House of Commons summarised with regard to a Commission proposal on prudential requirements: 'Britain therefore has a unique interest in financial services, in the same way the French have a unique interest in agriculture and the Germans have a unique interest in automotive industries.'²³⁵ Hence, any encroachment on the ability of the UK to manage financial services should be fought against, in the view of the UK MPs. Similarly, in the House of Commons in another debate on issuing a reasoned opinion it was argued that '[i]s it not possible that, because of their inertia, the other Member States will simply go

²³¹ House of Lords Grand Committee Debate of 13.12.2012, Column 409. The government expressed a similar opinion in the House of Commons. Cf. House of Commons Hansard Debates for 18.12.2012, Column 809.

²³² House of Lords, European Union Committee, 6th Report of Session 2012-13, pt. 11.

²³³ Bundestag Plenarprotokoll of 13.12.2012, p. 26504.

²³⁴ Senat, Zapis Stenograficzny, 135. Posiedzenie Komisji Spraw Unii Europejskiej, 8.02.2011, p. 8

²³⁵ House of Commons European Committee, Financial Services: Prudential Requirements, 14.03.2012, Column 24.

along with the Commission position and, however strongly we protest, Britain will be outvoted? Others do not have a particular national interest and they will tend to go along with whatever the Commission suggests.’²³⁶ This fact that ‘Britain has by far the largest financial services sector in the European Union should carry more weight.’²³⁷ Finally, the House of Commons presented a similar argument concerning the Common European Sales Law proposal, namely that is ‘an attempt to undermine the universality of English contract law, which is used in transactions not only between businesses within the EU but across the world, where, alongside New York law, it is the predominant way in which international trade is regulated.’²³⁸

Further, the number of reasoned opinions of both Polish chambers concerning Commission proposals in the field of CAP is quite remarkable (six out of eleven in the Sejm and five out of ten in the Senat). Accordingly, in the discussion of these reasoned opinions, a lot of emphasis was placed on the national interest of agriculture, calling it the Polish ‘apple of the eye.’²³⁹ The members of the parliament very often underlined that Poland is the biggest producer in their area of Europe, or the most agriculture-oriented Member State of those that have recently acceded.²⁴⁰ Hence, conferral of essential powers to the Commission in this sphere seems extremely unfavourable,²⁴¹ and Poland’s aim should be to defend the influence of Member States on this policy.²⁴²

While these two sections – on the redistributive character of EU policies and on idiosyncratic national interests – may shed some light on why the chambers in question decided to issue a reasoned opinion, it also signals that the members of national parliaments do not necessarily think in subsidiarity terms when conducting scrutiny under the EWS.

Beyond the issues signalled here, further points raised by national parliaments will be analysed in the forthcoming chapters. They include the scrutiny of the competence for

²³⁶ House of Commons, European Committee B, Financial Services Benchmarks, Column 7.

²³⁷ Ibid, Column 8.

²³⁸ House of Commons Hansard Debates for 7.12.2011, Column 319.

²³⁹ Own translation. Komisja do Spraw Unii Europejskiej, 2.02.2011, Nr 4659/VI, p. 12.

²⁴⁰ Komisja do Spraw Unii Europejskiej, 18.02.2011, Nr 4692/VI, p. 11; Senat, Zapis Stenograficzny, Wspólne posiedzenie Komisji Rolnictwa i Rozwoju Wsi oraz Komisji Spraw Unii Europejskiej, 3.02.2011, p.6.

²⁴¹ Komisja do Spraw Unii Europejskiej, 21.01.2011, Nr 4628/VI, p. 7.

²⁴² Sejm, Sprawozdanie Stenograficzne z 78. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 24.11.2010, p.110.

the EU to act and the analysis of delegations to adopt delegated and implementing acts. These two aspects of Commission proposals, as will be argued, go beyond the strict understanding of the subsidiarity principle under the EWS.

Chapter 6: Scrutiny of the Principle of Conferral under Protocol No. 2

Introduction

As described by Loïc Azoulay, '[t]he penetration of EU law into all areas of Member States competence is seen as perhaps the most disturbing phenomenon in the last 10 years.'¹ The 'federal order of competence' enshrined in the Lisbon Treaty was designed to provide 'a stable set of rules for determining the existence of and co-ordinating the exercise of the respective powers' for the EU.² Some portray the Lisbon Treaty as characterised by an 'overabundance of provisions' limiting the Union's competences.³ Article 5(1) TEU prescribes that 'the limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality.' Hence, whereas the principle of conferral elaborates upon the 'existence' of competence, the principle of subsidiarity (and proportionality), aims to regulate its 'exercise.'⁴

Scrutiny of the competence to propose draft legislative acts became a subject of interest for national parliaments under Protocol No. 2. Hence, it is not only the question of the exercise of powers by the EU that is delegated to parliamentary scrutiny under Protocol No. 2; rather, the existence of a competence for the EU to act also seems to stimulate the reasoned opinions of national parliaments. Taking into account the close links between the two principles, this review of the principle of conferral by national parliaments, especially with regard to Article 114 TFEU and Article 352 TFEU is not surprising.

Maintaining, however, that the role of national parliaments under Protocol No. 2 should be limited to review of the subsidiarity principle, this chapter attempts to uncover which treaty anchors for EU competence are the most disputed by national legislatures. Is it only Articles 114 and 352 TFEU? Inasmuch as the question of the EU competences and their limits in fact concerns the reach and the purpose of

¹ Loïc Azoulay, 'Introduction' in Loïc Azoulay (ed), *The question of competence in the European Union* (Oxford University Press 2014) at 9.

² von Bogdandy and Bast at 275.

³ Azoulay at 10.

⁴ Craig, *EU administrative law* at 391.

European integration, this chapter aims to present the views of national parliaments on this issue, as expressed in their reasoned opinions.⁵

To explore the limits of EU competence from the national parliaments' perspective, Section 1 first elaborates on the understanding of the principle of conferral under the Lisbon Treaty and its links to the subsidiarity principle. Next, Section 2 examines the reasoned opinions of national parliaments, which aim to control the principle of conferral. Section 3 focuses on the problematic Articles 114 and 352 TFEU. The case study pursued in Section 4 provides an in-depth analysis of the right to strike proposal based on the flexibility clause, where the main concern of national parliaments was the lack of competence of the EU.

1 The EU competence question

In this section, I summarise the reasons why ongoing European integration demanded clearer boundaries of EU competence. Further, I provide an overview of the doctrinal positions on the new order of competences introduced by the Lisbon Treaty. Finally, I explore the meaning of the principle of conferral and its close relationship with the subsidiarity principle, which contributes to the broad scrutiny of Commission proposals, including an assessment of their legal basis that we find in the reasoned opinions of national parliaments.

1.1 The development of EU 'competence creep'

The phenomenon of 'competence creep' was defined by Weatherill as the situation in which 'the scope of EC/ EU action has tended to 'creep' outwards beyond that foreseen by the Treaty.'⁶ The EWS was seen as a palliative against 'competence creep.' Specifically, because the principle of subsidiarity concerns the question of the exercise of competence, it could address the issue as to whether the EU takes action when it can be better done at national level. 'Competence creep' does not (only) concern questions about whether the EU has a competence or whether a legal basis has been chosen correctly; rather it asks whether the shared competence can be used by the national level, instead of being assimilated into the EU's competences.

⁵ Mayer, 'Competences-Reloaded-The Vertical Division of Powers in the EU and the New European Constitution' at 493.

⁶ Weatherill, 'Using national parliaments to improve scrutiny of the limits of EU action', 910.

There are two sources of EU competence creep: qualified majority voting (QMV) and the use of the ‘functionally broad’ Articles 114 and 352 (Article 95 and 308 EC; ex 100a and 235 EC).⁷ The application of majority voting at the expense of unanimous decision-making ‘generates a sharper appreciation of the importance of defining the limits of EU competence from that which prevails in times when anxious States knew the Council acted only if every State was in agreement.’⁸

The limit of Community competences has been eroded since the revitalisation of the Community in the mid-1970s.⁹ Article 235 EC Treaty [since the Maastricht Treaty, Article 308 EC] was ‘the key’ to this revival.¹⁰ It stipulated that, if action on the part of the Community in the common market was necessary to achieve the Treaty objectives, but the Treaty did not explicitly provide such power, the Council could, via a unanimous vote, and after consultation with the EP, approve legislation in that area. The frequent application of Article 235 EC Treaty when the Community did not have a specific legislative power in a certain area, ‘opened up practically any realm of state activity to the Community, provided the governments of the Member States found accord among themselves.’¹¹

It was not until the Single European Act that specific legal bases were introduced for the cases where Article 235 EC Treaty was applicable earlier. The Single European Act included a new Article 100a EC [since the Maastricht Treaty, Article 95 EC] Treaty, allowing for qualified majority voting for measures, the objective of which is the establishment and functioning of the internal market. This amendment, however, caused further growth in centralised EU policies; Member States especially contested ‘the Community’s competence to regulate in sensitive national areas such as culture, education, and public health.’¹² Taken together, the two provisions – Article 95 EC and Article 308 EC – were perceived as the ‘principal problem cases in the corrosive trajectory of “competence creep.”’¹³

⁷ Weatherill, ‘Competence creep and competence control’, 5.

⁸ Ibid.

⁹ Weiler, ‘The transformation of Europe’, 2449. Weiler explains that the Paris Summit of 1972 attempted a fresh start for the Community, after the Luxembourg Crisis (‘empty chair crisis’) and the double rejection of the accession by the UK.

¹⁰ Ibid.

¹¹ Ibid at 2450.

¹² Mark A Pollack, ‘The end of creeping competence? EU policy-making since Maastricht’ (2000) 38 *Journal of Common Market Studies* 519, 525.

¹³ Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide’, 851.

The broad framing of Articles 308 EC Treaty and 95 EC Treaty caused Member States to be concerned about their extensive use.¹⁴ A clearer delimitation of EU competence became part of the agenda after the Treaty of Nice.¹⁵ The Laeken Declaration on the Future of the European Union urged a ‘better division and definition of competence in the European Union.’¹⁶ A first series of questions posed in the Declaration focused on the distinction between the three types of Union competence: EU exclusive competence; Member States’ exclusive competence and competence shared between these two levels. The series also included a question on the application of the subsidiarity principle. A second collection of questions concerned the ‘reorganisation of competence’ in areas such as common foreign policy and defence policy; police and criminal cooperation; social inclusion; the environment, health, and food safety. The issue at stake was whether the implementation of these policies should not be left ‘more emphatically’ to the national level. Finally, the problem of finding the right balance between the redefinition of competences and not halting the EU decision-making process and allowing the latter to react in time was pondered. The question was raised whether Articles 95 and 308 should be reviewed, taking into account the ECJ’s case law.

1.2 The ‘new order of competences’ in the Lisbon Treaty and its assessment

The Treaty of Lisbon eventually provided some clarity on the question ‘qui fait quoi, that is, which level(s) of governments may be responsible for which kinds of policy action.’¹⁷ Building upon the categories of the Constitutional Treaty,¹⁸ the Lisbon Treaty classifies competences as EU exclusive competences (Article 3 TFEU), shared competences (Article 4 TFEU), and competences to support, co-ordinate, or supplement Member State action (Article 6 TFEU).

This new catalogue has been welcomed by EU law scholarship with varying degrees of satisfaction. Craig gives credit to the division as ‘helpful’ in providing ‘greater clarity,’ anticipating, however, ‘problems of demarcating the boundaries of each

¹⁴ Craig, *EU administrative law* at 387.

¹⁵ *Ibid* at 369.

¹⁶ Laeken Declaration p. 21-22.

¹⁷ Gráinne de Búrca and Bruno de Witte, ‘The Delimitation of Powers between the EU and its Member States’ in Anthony Arnall and Daniel Wincott (eds), *Accountability and legitimacy in the European Union* (Oxford University Press 2002) at 203.

¹⁸ On the division of competences under the Constitutional Treaty Cf. Constantinesco, ‘Les compétences et le principe de subsidiarité’ at 305. For a critical assessment see Mayer, ‘Competences-Reloaded-The Vertical Division of Powers in the EU and the New European Constitution’ at 493.

category.’¹⁹ In the same vein, Weatherill assesses the reforms as ‘useful,’ but with a ‘conservative taste.’ On the one hand, Articles 2-6 TFEU are more transparent when it comes to the ‘scope, nature and effect’ of the EU legislative competence; on the other hand, ‘in substance little changes.’²⁰ In addition, in the view of Weatherill, the problematic Article 114 TFEU, together with subsidiarity and proportionality, underwent only ‘cosmetic’ textual changes, without an effort to put a limit on EU competence.²¹ Chalmers does not see in the Treaty of Lisbon an extension of EU competences, but rather a reflected image of the existing case law of the ECJ.²² Adopting a much more negative stance, Schütze perceives the competence categorisation as a ‘step backwards’ in terms of ‘constitutional clarity;’ ‘instead of three clear-cut competence categories, the Reform Treaty would give us three official and a number of “unofficial” competence types, none of which impresses by defined contours,’ with similar criticism of the lack of clarity with regard to the ‘distinction *between* different types of competences.’²³

1.3 Links between the principles of conferral and subsidiarity

Article 5 TEU closely links the principle of conferral to the principle of subsidiarity.²⁴ This close relationship renders the competence question not a simple ‘yes-or-no question,’²⁵ which leads a number of scholars to put forward that the assessment of Commission proposals under the EWS includes the scrutiny of the principle of conferral as the ‘first step.’²⁶ This argument is often based on the *logical* assumption that ‘if the Union already fails the competence test, a subsidiarity test even if conducted cannot possibly be positive.’²⁷ Against this reasoning, Article 5(3) TEU does not indicate that under the EWS national parliaments can control also the principle of conferral, but in fact the provision at stake makes a direct referral to

¹⁹ Craig, *EU administrative law*, 399.

²⁰ Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide’, 850.

²¹ Ibid.

²² See Minutes of Evidence taken before the Select Committee on the European Union, 20.11.2007, oral evidence given by D. Chalmers, 10th Report of Session 2007–08, The Treaty of Lisbon: an impact assessment, Volume II: Evidence, S3.

²³ Robert Schütze, ‘Lisbon and the federal order of competences: a prospective analysis’ (2008) 33 *European law review* 709.

²⁴ Craig, *EU administrative law*, 391.

²⁵ de Búrca and de Witte at 205.

²⁶ See for example Calliess, *Subsidiaritäts- und Solidaritätsprinzip in der Europäischen Union* at 64.

²⁷ Kiiver, *The early warning system for the principle of subsidiarity: Constitutional theory and empirical reality*, 99.

Protocol No. 2. The answer to the logical argument could be hence that for the purpose of the EWS national parliaments have to assume that the legal basis of the proposal is correct.

To support the view of that conferral and subsidiarity principles can be reviewed separately, Judge Thomas von Danwitz expands on the relationship between them by first noting that the Amsterdam Protocol provided for ‘tangible contours’ to the concept of subsidiarity, allowing for its legal application as ‘a benchmark for the exercise of nonexclusive Community competences in specific cases.’²⁸ Moreover, he highlights that the Lisbon Treaty has put ‘additional emphasis on the task of separation of competences that significantly extends its importance relative to previous treaties.’²⁹ Von Danwitz concludes from this that the subsidiarity principle, as enshrined in the Treaty, cannot settle the question of competence, even though that question might be related to the more general idea of subsidiarity.³⁰

There is also a widespread argument that national parliaments should scrutinize the principle of conferral under the subsidiarity review, because the ECJ has not been a sufficient safeguard of the distribution of competences. In defence of the Court, von Bogdandy and Bast argue that the argument that the Court ‘pushes for an expansive interpretation of the competences has always been false;’ they argue similarly as regards the view that the Courts’ judgments are ‘one-sided in favour of a (short term) integration-friendly solution.’³¹ Von Bogdandy and Bast support their position with the argument that ‘in a number of important decisions since the beginning of the 1990s, the ECJ has adjudicated on the vertical competences, and not always favourably for the Union,’ as for example in the Tobacco Advertising case, where the Court ruled against the broad political consensus of EU legislative institutions and Member States.³²

In Chapter 4, I explained why the ECJ, rather than national parliaments, is more apt to review the compatibility of EU draft legislative acts with the principle of conferral. The Court, as the final interpreter of the EU Treaties, with an explicit function to review the legality of EU legislative acts, appears to be better endowed with the

²⁸ von Danwitz at 40.

²⁹ Ibid.

³⁰ Ibid at 41.

³¹ von Bogdandy and Bast at 257.

³² Ibid.

technical expertise on EU law needed to review whether the EU has the power to act within a certain domain. In addition, in the *ex ante* legislative phase, the Council and the EP conduct a review of the legal basis of proposals. Taking into account these arguments, I have argued against a broad subsidiarity review, which encompasses the review of the competence.

Notwithstanding this, parliamentary chambers in their reasoned opinions very often put the principle of conferral under scrutiny. How do national parliaments justify the scrutiny of the enabling provision? National parliaments focus on the positive aspect of the principle of constitutional legality, which purports that every act of EU secondary law requires a legal basis in the treaties or in secondary law, itself anchored in the treaties.³³ For example, the German Bundesrat, which habitually checks the principle of conferral, justifies its broad scrutiny of Commission proposals with the logical interrelation between competence and subsidiarity. As the chamber argues, '[t]he subsidiarity principle in essence concerns the principle of the exercise of competences. The subsidiarity principle is also breached if there is no European Union competence in the area in question. For that reason, the first question to consider when conducting a subsidiarity check is the issue of the legal basis.'³⁴ Similarly, the Spanish parliament considers first the principle of conferral, as '[i]n the wording of Article 5 of the TFEU, the principle of conferral precedes, not by pure chance, the definition of the principle of subsidiarity.'³⁵ Occasionally, some parliaments while drafting their reasoned opinions, test whether the legal basis has been chosen correctly, not necessarily as a first step in their scrutiny.³⁶

³³ Ibid at 229-231. Von Bogdandy and Bast frame the competence question as a principle of constitutional legality upon which builds European constitutional law. This principle consists of two limbs - a negative and a positive one - which delimit and enable EU actions accordingly. The negative aspect underlines the hierarchical order of EU law and means that any EU act must be compatible with EU primary law. In fact, the negative aspect of competence is rather marginal in the reasoned opinions of national parliaments. See for example Swedish Riksdag, Reasoned opinion of 17.10.2013 on COM(2013) 520.

³⁴ German Bundesrat, Reasoned opinion of 16.12.2012 on COM(2011) 654, pt 2; of 30.03.2012 on COM (2012) 10 and of 7.06.2013 on COM(2013) 173. Also the Polish Sejm perceives a violation of the conferral principle as a violation of subsidiarity (scrutiny of competence supplements subsidiarity). Cf. Polish Sejm, Reasoned opinion of 13.05.2011 on COM(2011) 121 and of 15.9.2012 on COM(2012) 369. However, some parliaments, like Italian Camera dei Deputati, Reasoned opinion of 15.12.2011 on COM(2011) 615 assess that the legal basis is wrong, but there is no subsidiarity violation.

³⁵ Spanish parliament, Reasoned opinion of 13.06.2012 on COM(2012) 167.

³⁶ Greek parliament, Reasoned opinion of 21.02.2013 on COM(2012) 788 and Italian Senato of 30.01.2013 on COM (2012) 788; Dutch Eerste Kamer, Reasoned opinion of 24.01.2012 on COM (2011)793, 794; Both Dutch chambers, Reasoned opinion of 17.02.2011 on COM(2010) 748; Romanian Chamber of Deputies, Reasoned opinion of 24.10.2011 on COM(2011) 453.

Finally, the notions of ‘competence’ and ‘power’ used in the treaties or the terms ‘enabling norm’ and ‘legal base,’ do not seem to have distinct legal meanings.³⁷ This allows for the qualification of the criticism of national parliaments in relation to a lack of competence or enabling norms, through a violation of the principle of conferral.

2 Reasoned opinions on competence violation

In this section, I attempt to answer the question of how national parliaments frame a violation of the conferral principle. To this extent, this section lists the competence issues raised by national parliaments concerning treaty provisions other than Articles 114 and 352 TFEU, which will be elaborated upon separately in Section 3. There are two strands of arguments of competence violation that national parliaments pursue, which I develop separately. First, the principle of conferral might be violated, because the area under regulation falls outside the ambit of the Treaty’s legal basis. Second, the Commission proposal may pursue an objective that is different from the one indicated in the legal basis. Finally, this section lists the areas which are of ‘exclusive competence’ or remaining under ‘national sovereignty’ that are indicated by parliamentary chambers in their reasoned opinions.

2.1 The area that the draft legislative act regulates falls outside of Treaty legal basis

The dominant type of competence scrutiny concerns situations where the action pursued by a Commission proposal falls outside of Treaty legal basis in the view of national parliaments. However, this claim is different from the allegation that the issue at stake falls ‘outside (overall) EU competence,’ as presented in Section 2.3 below.

The first illustration of a draft proposal with an allegedly wrong legal basis is the Commission proposal establishing a set of rules of international private law applicable to the property consequences of registered partnerships in the area of judicial cooperation in civil matters.³⁸ The proposal was based upon Article 81(3) TFEU which allows the Council acting unanimously after consulting the EP to establish measures concerning family law with cross-border implications. The Italian Senato questioned the legal basis of the proposal by arguing that ‘family law’ does not cover

³⁷ von Bogdandy and Bast at 229.

³⁸ COM(2011) 127.

the notion of ‘registered partnership.’³⁹ In its reply to the chamber, the Commission plausibly indicated that ‘the concept of “registered partnership” finds its sources in a family relationship between the persons involved and it is so closely linked with the family, it is considered to be part of family law.’⁴⁰

With regard to another draft legislative act, the Polish Sejm highlighted problems with the legal basis concerning the Commission proposal ‘Women on Board’ introducing a 40% quota for women on non-executive company boards. The chamber argued that board members who are not employed within the meaning of TFEU are not covered by the principle of equal pay for male and female workers for equal work or work of equal value, which applies only in relationships of employment (Article 157(3) TFEU).⁴¹ As the Commission rightly pointed out in the reply to the Polish Sejm, ‘[t]he use of [Article 157(3) TFEU] is not restricted to ‘workers’ but it must also be stressed that the EU law concept of ‘worker’ has been given a wide interpretation by the Court of Justice of the EU.’⁴² The Commission convincingly invoked the *Danosa* case according to which a member of a capital company’s Board of Directors who provides services to that company and is an integral part of it must be, under specific conditions, regarded as having the status of a worker.⁴³

The examples of the concerns of national parliaments with regard to the legal basis seem hence to show that the assessment of national parliaments is not necessarily correct. It might also be explained by the fact that national parliaments seem to reserve ‘exclusive national competence’ in areas such as family law (see section 2.3. below).

2.2 The draft legislative act pursues a different objective than indicated in the legal basis

The second strand of arguments regarding competence violations relies on Article 5(2) TEU, which states that the EU may take action ‘only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the *objectives* set out therein.’⁴⁴ Following the wording of the treaty, national parliaments

³⁹ Italian Senato, Reasoned opinion of 25.05.2011 on COM(2011) 127.

⁴⁰ Commission reply of 12.03.2012 to the Reasoned opinion of the Italian Senato on COM(2011) 127.

⁴¹ Polish Sejm, Reasoned opinion of 4.01.2013 on COM(2012) 614.

⁴² Commission reply of 17.7.2013 to the reasoned opinion of the Polish Sejm on COM(2012) 614.

⁴³ Case C-232/09 *Danosa* [2010] ECLI:EU:C:2010:674, para 56.

⁴⁴ Emphasis added.

argue that the Commission anchors its proposals on an incorrect legal basis, as the draft legislative act pursues a different objective than that stipulated in the treaty provision in question.

The series of Commission proposals on aid to the most deprived people in the EU illustrates this problem well. In 2010, following the reform of the CAP, the Commission proposed a regulation on the distribution of food products to the most deprived persons in the Union.⁴⁵ The proposal, amending the existing legislation in this area, was supposed to guarantee the aims of the CAP and help achieve cohesion objectives.⁴⁶ Its aim was to establish a scheme to distribute food products to the most deprived persons in the Union through Member State organisations. The products were to be made available from intervention stocks, but could have also been purchased on the market. The national parliaments, in their reasoned opinions, questioned the extent to which purchases from the market contribute to the objectives of the CAP, maintaining instead that the objective shifted from having been an agricultural policy measure to a social policy measure.⁴⁷ The Commission withdrew the proposal due to an ECJ judgment, stating that purchases from the market for deprived persons could not be made under the auspices of agricultural legislation.⁴⁸ In consequence, the Commission revised the proposal and added Article 175(3) TFEU as the legal basis, relating to economic, social and territorial cohesion, as a joint legal base next to Articles 42 and 43(2) TFEU on agriculture.⁴⁹ National parliaments maintained, however, that the proposal's objective is extended to social policy.⁵⁰ Nevertheless, the proposal was adopted and the supply of food to the most deprived people was extended to the end of 2013. In the meantime, in 2012 the Commission proposed a new instrument, namely the Fund for European Aid to the Most Deprived, which is based on Article 175(3) TFEU, that is, social cohesion policy, and no longer

⁴⁵ COM(2010) 486.

⁴⁶ Motive (2) of the preamble.

⁴⁷ Danish Folketing, Reasoned opinion of 15.11.2011; Swedish Riksdag, Reasoned opinion of 10.11.2010; Dutch Eerste Kamer, Reasoned opinion of 30.11.2010, all on COM(2010) 486. The Danish Folketing (7.3.2011) and the Swedish Riksdag (9.3.2011) maintained the same position with regard to COM(2010) 799 on common organization of agricultural markets and on specific provisions for certain agricultural products, which included provision regarding distribution of food products to the most deprived persons in the Union.

⁴⁸ Case T-576/08 *Germany v Commission* [2011] ECLI:EU:T:2011:166.

⁴⁹ COM(2011) 634.

⁵⁰ Swedish Riksdag, Reasoned opinion of 1.12.2011 and House of Lords, Reasoned opinion of 11.11.2011 both on COM(2011) 634.

on the CAP.⁵¹ Nonetheless, the German Bundestag maintained that the legal basis provided by the Commission does not include a competence for combating poverty and the proposal concerns the implementation of social policy, which falls within the remit of the Member States of the European Union.⁵²

Overall, the saga on the aid for the most deprived persons depicts the critical approach of national parliaments to the Commission's choice of a treaty anchor and the argument that the proposal allegedly pursues objectives other than those stated in that basis.⁵³ In fact, the Lisbon treaty added 'mainstreaming clauses' which oblige EU institutions to take into account in defining and implementing its policies and activities, requirements linked to, among others, the guarantee of adequate social protection and the fight against social exclusion (Article 9 TFUE).⁵⁴ Hence, such requirements as social protection should not be criticised by national parliaments as a violation of the conferral principle.

2.3 List of the areas of 'exclusive national competence'

The examples cited above show a sensitivity of national parliaments vis-à-vis the validity of the legal basis chosen by the Commission for its proposals. This is not only a purely legal control of the principle of conferral. In fact, the use of the Early Warning System for the review of issues other than subsidiarity, and specifically for the scrutiny of EU competence to act is quite telling when it comes to the reach and the purpose of European integration, as seen from the perspective of national parliaments. Their views, previously voiced only through their respective governments in the Council, are a new source of information about the fields of competence that national parliaments perceive as falling under national sovereignty. Specifically, in the view of national parliaments, the criticised Commission proposals breach the principle of conferral as they touch upon an 'exclusive competence of Member States.'

⁵¹ COM(2012) 617.

⁵² German Bundestag on COM (2012) 617.

⁵³ Similarly, national parliaments maintained that a proposal introducing the Common Financial Transaction Tax aims at creating a new EU budget income resource and is not directed at a smooth functioning of the internal market. Cf. Cypriot parliament, Reasoned opinion of 2.12.2011; Swedish Riksdag, Reasoned opinion of 1.12.2011; Maltese parliament, Reasoned opinion of 12.12.2011, all on COM(2011) 594.

⁵⁴ Bruno De Witte, 'A competence to protect. The pursuit of non-market aims through internal market legislation' in Phil Syrpis (ed), *The judiciary, the legislature and the EU internal market* (Cambridge University Press 2012) at 32.

The notion of exclusive competence, often used by national parliaments, cannot be found in the same wording in the treaties, which rather speak of an exclusive Member State competence in the sense that ‘competences not conferred upon the Union in the Treaties remain with the Member States.’ However, some of the treaty provisions bar certain matters from EU regulation, as for example Article 153(5) TFEU, which concerns pay, the right of association, the right to strike and the right to impose lock-outs.

Areas that reasoned opinions consistently qualify as an ‘exclusive competence,’ as a ‘national competence’ or as remaining under national sovereignty are the following: direct corporate tax,⁵⁵ combating poverty,⁵⁶ substantive family law,⁵⁷ maritime spatial plans and integrated coastal management strategies (substantive spatial planning law),⁵⁸ some aspects of criminal law,⁵⁹ emergency services,⁶⁰ management of the national statistical system,⁶¹ maintaining public order and internal security,⁶² deciding on operating restrictions and noise abatement at EU airports,⁶³ access to and sharing of benefits from genetic resources and traditional knowledge concerning genetic resources,⁶⁴ management of spectrum in electronic communications,⁶⁵ allowing for access to information on economic operators,⁶⁶ and the functioning and supervision of

⁵⁵ Irish Dail Eireann, Reasoned opinion of 17.05.2011; Slovak Národná Rada, Reasoned opinion of 12.05.2012; Polish Sejm, Reasoned opinion of 13.05.2011, all on COM(2011) 121.

⁵⁶ Swedish Riksdag, Reasoned opinion of 4.03.2011 on COM(2010) 799; Swedish Riksdag of Reasoned opinion of 1.12.2011 on COM(2011) 634; German Bundestag, Reasoned opinion of 12.12.2012 on COM(2012) 617.

⁵⁷ Polish Sejm, Reasoned opinion of 26.05.2011 on COM(2011) 127.

⁵⁸ Lithuanian Seimas, Reasoned opinion of 7.05.2013; Finish Eduskunta, Reasoned opinion of 8.05.2013; Dutch Tweede Kamer, Reasoned opinion of 25.04.2013; Dutch Erste Kammer, Reasoned opinion of 25.04.2013 and German Bundesrat, reasoned opinion of 3.05.2013 all on COM(2013) 133.

⁵⁹ Swedish Riksdag, Reasoned opinion of 17.10.2012 on COM(2012) 363; German Bundesrat, Reasoned opinion of 30.03.2012 on COM(2012) 10.

⁶⁰ As a competence of German Länder; German Bundesrat, Reasoned opinion of 2.03.2012 on COM(2011) 897.

⁶¹ As a competence of Spanish regions and Austrian Länder; Spanish parliament, Reasoned opinion of 13.06.2012 and Austrian Bundesrat, Reasoned opinion of 12.06.2012 both on COM(2012) 167.

⁶² Portuguese parliament, Reasoned opinion of 4.11.2011; Swedish Riksdag, Reasoned opinion of 10.11.2011 and Dutch chambers, Reasoned opinion of 8.11.2011 all on COM(2011) 560.

⁶³ German Bundesrat, Reasoned opinion of 7.02.2011 on COM(2011) 828.

⁶⁴ Swedish Riksdag, Reasoned opinion of 20.12.2012 and French Senate, Reasoned opinion of 20.12.2012, both on COM(2012) 576.

⁶⁵ Irish parliament, Reasoned opinion of 23.10.2013 and Maltese parliament, Reasoned opinion of 7.11.2013 both on COM(2013) 627.

⁶⁶ Spanish parliament, Reasoned opinion of 21.01.2014 on COM(2013) 796.

pensions systems.⁶⁷ Moreover, national parliaments argue that deciding on expenditure and revenue in the national budget is a national concern.⁶⁸

What do we learn from this list? First, the competences selected by national parliaments significantly vary which shows that Member States may have different sensibilities. Second, issues such as family and criminal law and security are seen as reserved for Member States, similarly as social measures – fight against poverty or supervision of pensions or close to the budgetary prerogatives: taxation and decisions on expenditure and revenue. The main problem is however the quality of the criticism of national parliaments; the notions such as ‘family’, ‘criminal’ or ‘social’ seem to be the ‘buzz words’ for national parliaments leading to some simplifications. The reasoned opinions seem to generalise and be rather superficial with regard to competences; regulation of recognition and enforcement of decisions concerning property consequences of registered partnerships implied in the view of the Polish parliament violation of exclusive national competence on substantive family law and introduction of partnerships into national law through the ‘back door.’⁶⁹

3 Special cases: Article 114 and Article 352 TFEU

In this section, I discuss, first, whether the Lisbon Treaty endows national parliaments with specific competence scrutiny powers to review draft legislative acts based on Articles 114 and 352 TFEU. Second, focusing on Article 114 TFEU, I demonstrate how the scrutiny of the internal market clause is pursued by national parliaments, without an enabling provision in the treaty.

The biggest number of reasoned opinions concerns draft legislative acts based on Articles 114 TFEU and 352 TFEU. The former provision concerns the approximation of laws in the internal market and the latter provides a foundation for when EU action is necessary to attain one of the treaty objectives in cases where the treaty did not foresee such a power for the EU (the so-called ‘flexibility clause’).⁷⁰ As a

⁶⁷ Tweede Kamer, Reasoned opinion of 15.05.2014 on COM(2014) 147.

⁶⁸ Swedish Riksdag, Reasoned opinion of 25.01.2012 on COM(2011) 821.

⁶⁹ Polish Sejm, Reasoned opinion of 27.05.2011 on COM(2011) 127 and the Commission reply to the Polish Sejm of 26.01.2012.

⁷⁰ On the history of earlier version of Art 352 TFEU in legislative practice see Weiler, ‘The transformation of Europe’, 2444.

consequence of these ‘functional competences,’ the EU may legislate in fields where a specific policy legal basis is not given.⁷¹

Opposition to Commission proposals based on Articles 114 and 352 TFEU does not come as a surprise. These provisions are the usual suspects of ‘competence creep.’⁷² Already at the time of the negotiation of the Constitutional Treaty, the drafters attempted to introduce some supervision of the original Article 95 EC Treaty (current Article 114 TFEU) and Article 308 EC Treaty (current Article 352 TFEU). Weatherill argued that ‘both Articles 95 and 308 were properly implicated by the Laeken Declaration in the crime of competence creep, and the new monitoring arrangements should be targeted at both their successors, Arts III-172 and I-18 respectively, and not at the latter alone.’⁷³ Moreover, the same scholar maintained that Article I-18 proposed in the Constitutional Treaty (current Article 352 TFEU) gave national parliaments the possibility to control competence as well as subsidiarity, and should also apply in those cases where the EU aims at harmonizing the internal market, according to Article III-172 (nowadays Article 114 TFEU).⁷⁴ The lack of such a competence control mechanism with regard to the latter provision would make national parliaments ‘work backwards, by attacking the use of Art. III-172 in legislative drafts by relying on their acknowledged right to raise objections rooted in subsidiarity, and arguing that review of the matter from the perspective of subsidiarity necessarily also implicates assessment of the very validity of the chosen legal base.’⁷⁵

Under the Lisbon Treaty, which did not significantly change the internal market provision or the flexibility clause, no specific, legal basis oriented control rights are conferred upon the national parliaments, especially with regard to Article 114 TFEU. Only Article 352(2) TFEU refers to national parliaments:

‘Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the

⁷¹ de Búrca and de Witte at 214.

⁷² Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide’, 855.

⁷³ Weatherill, ‘Better competence monitoring’, 36.

⁷⁴ Weatherill argues that the omission of the national parliaments oversight with regard to Article 114 TFEU, seem not to be a conscious design, but rather a consequence of spreading the issue of competences between different Convention Working Groups. Cf. Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide’, 856.

⁷⁵ Weatherill, ‘Better competence monitoring’, 37.

Commission shall draw national Parliaments' attention to proposals based on this Article.'

Despite the quite strict, but clear, wording of Article 352 TFEU on 'drawing attention of national parliaments,' Rosas posits that the flexibility clause allows national parliaments to review the compatibility of draft legislative acts with this provision.⁷⁶ As Rosas notes, Article 352(2) TFEU provides that the procedure for monitoring the subsidiarity principle referred to in Article 5(3) TEU should be used to draw national parliaments' attention to draft legal acts based on the flexibility clause. In the opinion of Rosas, 'the control mechanism (...) in relation to the principle of subsidiarity [has] been transposed to the operation of the competence clause.' In the same vein, Weatherill argues that the Early Warning System is 'applicable not only to subsidiarity concerns arising under any Treaty provision authorizing legislative action: it applies *mutatis mutandis* to any legislative proposal adopted under Article 352 TFEU, where objectives need not be confined to perceived violation of the subsidiarity principle.'⁷⁷ The views of Rosas and Weatherill imply, therefore, that national parliaments would have the possibility to issue reasoned opinions with regard to the legal basis of proposals based on Article 352 TFEU.⁷⁸

Yet, Article 352 TFEU seems to put an obligation on the Commission only to signal to national parliaments that the proposal is anchored on the flexibility clause, without changing the original role of national Parliaments in the EU legislative process. In Craig's view, 'the more natural interpretation is that because [the] flexibility clause entails an exceptional use of EU legislative power, the Commission has an obligation, to draw this to the attention of national parliaments, in order that they might contest it on the grounds of subsidiarity.'⁷⁹ As will be explained below, this is also the interpretation of the Commission, which, by rejecting the first 'yellow card,' also excluded that the EWS should involve scrutiny of the legal base in case of proposals based on Article 352 TFEU.

⁷⁶ Allan Rosas and Lorna Armati, *EU constitutional law: an introduction* (Hart 2010) at 42.

⁷⁷ Weatherill, 'The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court's Case Law has Become a Drafting Guide', 853.

⁷⁸ See UK House of Commons, Reasoned opinion of 12.02.2014 on COM(2013) 893, point 8 which follows up on Weatherill's position and labels Art 352(2) as an 'extra ground' for challenging Commission proposals. In the case at stake, even though the Art 352 legal basis seemed 'highly doubtful' to the chamber it relied on other arguments.

⁷⁹ Craig, *EU administrative law* at 389.

The internal market provision is even less friendly to national parliaments. Article 114 TFEU does not even include a ‘national parliaments clause’ comparable to that in Article 352 TFEU. In consequence, as foreseen by Weatherill, by not providing specific scrutiny rights for Article 114 TFEU, the Lisbon Treaty with Protocol No. 2 opened opportunities for national parliaments to reprimand the Commission’s choice of legal basis.⁸⁰ It is true that, on a number of occasions, national parliaments have raised difficult questions with regard to Commission proposals based on the internal market clause.⁸¹ These concerned cases where, in the view of national parliaments, the internal market regulation was not the main objective of the proposal,⁸² the proposal aimed at harmonisation of purely national situations,⁸³ the proposal’s reference to Article 114 was insufficient,⁸⁴ or harmonisation in a specific field was excluded.⁸⁵ Moreover, according to national parliaments, cases where the Commission introduces a system in parallel to existing national provisions do not fall within the scope of Article 114 TFEU.⁸⁶

The draft of the Common European Sales Law illustrates such a case.⁸⁷ In October 2011, the Commission proposed a regulation to reduce differences in contract law between Member States, which hinder traders and consumers from engaging in cross-border trade within the internal market.⁸⁸ The Common European Sales Law, as a

⁸⁰ Weatherill, ‘The Limits of Legislative Harmonization Ten Years after Tobacco Advertising: How the Court’s Case Law has Become a Drafting Guide’, 855-857 and Weatherill, ‘Better competence monitoring’, 37 (concerns CT but applicable to LT).

⁸¹ Davies points out that while Art 114 TFEU enshrines a shared competence, it seems that subsidiarity will not apply since when the EU wants to create uniformity, ‘Member States will never be able to achieve the goals pursued by harmonization.’ Lack of application of subsidiarity to ‘functional competences’ seemed ‘bizarre’ to Davies. Cf. Davies, ‘Subsidiarity: the wrong idea, in the wrong place, at the wrong time’, 75. However, Davies’ point might explain the focus of national parliaments on the legal basis instead of subsidiarity with regard to proposals based on Art 114 TFEU.

⁸² House of Commons, Reasoned opinion of 9.11.2011 on COM(2011) 452. It was argued that the primary objective is prudential supervision of banks. Similarly, see the reasoned opinions of the Bulgarian parliament (28.02.2013), Italian Camera (19.02.2013), Czech Chamber of Deputies (24.1.2013) on COM (2012) 788. These chambers argued that the proposal aims at regulating public health, which is under the scope of article 168 TFEU.

⁸³ German Bundesrat, Reasoned opinion of 24.01.2012 on COM(2011) 793 stated that ‘in the case of purely domestic transactions, there is no sound reason for obliging Member States to adopt measures for a legal protection system for alternative dispute settlement with a view to promoting cross-border trade.’

⁸⁴ Austrian Nationalrat, Reasoned opinion of 17.04.2012 on COM(2012) 84 argued that Art 114 is not sufficient to cover the organisation of statutory health systems of Member States, which the proposal intends to do.

⁸⁵ Polish Sejm, Reasoned opinion of 10.10.2012 on COM(2012) 369 argued that Art 179(3) TFEU excludes harmonisation of clinical trials.

⁸⁶ Italian Senato, Reasoned opinion of 30.01.2013 on COM(2012) 788.

⁸⁷ COM(2011) 635.

⁸⁸ Explanatory Memorandum p.1.

‘self-standing uniform set of contract law rules including provisions to protect consumers’ would run as ‘a second contract law regime within the national law of each Member State.’⁸⁹

In their replies to the Commission, national parliaments reacted negatively to the legal basis of the proposal. The Bundesrat of Austria and that of Germany argued that Article 114 TFEU could not be used for legal acts which exist in parallel to national laws.⁹⁰ Similarly, both Belgian chambers, the Chambre des Représentants and the Sénat opined that the proposal did not aim at approximating national sales law provisions, as it neither replaces nor harmonises them.

Interestingly, in the Common European Sales Law case, the Austrian Bundesrat, the German Bundesrat and the Belgian Sénat proposed that a more appropriate legal basis for the proposal would be Article 352 TFEU. This is not a unique case where, via an assessment of the legal basis, national parliaments suggest a correct legal basis to the Commission.⁹¹ In most of the cases, national parliaments put forward Article 352 TFEU as an appropriate legal basis for the contested Commission proposals.⁹² The reasons for this seem twofold. First, the Council has to unanimously agree to the legal acts based on Article 352 TFEU. Second, in some Member States, the national provisions demand that the national parliament has to consent to a Commission proposal based on Article 352 TFEU before a national minister votes in the Council. For example, in such case German law demands that the German representative in the Council needs the consent of the Bundestag expressed in a legal act before it can agree to the proposal,⁹³ similarly to in the UK, where the agreement demands the

⁸⁹ Ibid, p. 4, 6.

⁹⁰ Austrian Bundesrat, Reasoned opinion of 30.11.2011; German Bundestag, Reasoned opinion of 1.12.2011; Belgian Chamber of Representatives, Reasoned opinion of 9.12.2011 and Belgian Senate, Reasoned opinion of 9.12.2011 all on COM(2011) 635.

⁹¹ Both Dutch chambers, Reasoned opinion of 8.11.2011; Portuguese parliament, reasoned opinion of 4.11.2011; Swedish parliament, Reasoned opinion of 10.11.2011 and Romanian Senate, Reasoned opinion of 9.11.2011 all on COM(2011) 560. They propose to exchange Art 77(1)(2) with Art 72 TFEU. Spanish parliament; Reasoned opinion of 14.06.2011 on COM(2011) 216. It proposes to exchange Art 118(1) with Art 118 (2) TFEU.

⁹² Danish Folketing, Reasoned opinion of 15.11.2010 and Swedish Riksdag, Reasoned opinion of 10.11.2010 both on COM(2010) 486; Danish Folketing, Reasoned opinion of 7.3.2011 and Swedish Riksdag, Reasoned opinion of 9.3.2011 on COM(2010) 799; Austrian Bundesrat, Reasoned opinion of 30.11.2011; German Bundestag, Reasoned opinion of 1.12.2011 and Belgian Senate, Reasoned opinion of 9.12.2011 all on COM(2011) 635; Austrian Nationalrat, Reasoned opinion of 28.05.2014 and Austrian Nationalrat, Reasoned opinion of 27.05.2014 both on COM(2014) 212.

⁹³ §8 Integrationsverantwortungsgesetz vom 22. September 2009 (BGBl. I S. 3022), geändert durch

previous consent of the Westminster parliament via an Act of Parliament before a Minister can agree to the proposal in the Council.⁹⁴ Milder means, such as those in Poland, include that a minister asks for the opinion of the parliament before consenting in the Council to a legal act based on Article 352 TFEU.⁹⁵

The lack of a possibility for national parliaments to scrutinise the legal basis of Commission proposals and most of all, proposals anchored in Articles 114 and 352 TFEU, did not prevent national parliaments from raising the first ‘yellow card,’ which was to a large extent focused on the lack of competence of the EU to act and to apply the flexibility clause. This case is the subject of the case study in the next section.

4 Case study: The ‘yellow card’ on the right to strike proposal

In this part of the chapter, I will explore in detail the first ‘yellow card’ triggered by national parliaments.⁹⁶ First, I explain briefly the background of the Commission proposal. Second, I summarise the content of the proposal. Next, I list the main concerns of national parliaments with regard to the Commission proposal. Finally, in the last section, I comment on the outcome of the first ‘yellow card’ and its meaning for the relationship between the principles of conferral and subsidiarity.

4.1 Background

In December 2007, the Court of Justice decided on two related cases *International Transport Workers’ Federation v. Viking*⁹⁷ and *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*.⁹⁸ For the first time, the ECJ ruled that the right to strike is a fundamental right of the EU constitutional order, and that the right of workers to

Artikel 1 des Gesetzes vom 1. Dezember 2009 (BGBl. I S. 3822). This provision, introduced at the request of the German Federal Constitutional Court in the Lisbon judgment is criticised as going ‘too far,’ because of the ‘danger of lack of flexibility.’ See Calliess and Beichelt at 12.

⁹⁴Paul Craig, ‘The European Union Act 2011: Locks, limits and legality’ (2011) 48 Common Market Law Review 1881, 1884.

⁹⁵ Art 10, Ustawa z dnia 8 października 2010 r. o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej.

⁹⁶On the first ‘yellow card’ see also Cygan, *Accountability, parliamentarism and transparency in the EU* at 179-183; Barrett, ‘Monti II. The Subsidiarity Review Process Comes of Age... Or Then Again Maybe It Doesn’t’; Goldoni; Danuta Adamiec, ‘Pierwszy wypadek zastosowania mechanizmu żółtej kartki—opinie parlamentów dotyczące rozporządzenia Monti II’ [2012] *Zeszyty Prawnicze* 23; Jančić, ‘Representative democracy across levels? National Parliaments and EU Constitutionalism’, 260-263.

⁹⁷Case C-438/05 *The International Transport Workers’ Federation and The Finnish Seamen’s Union* [2007] ECLI:EU:C:2007:772 (Viking).

⁹⁸Case C-341/05 *Laval un Partneri* [2007] ECLI:EU:C:2007:809.

take industrial action is to be protected as a constitutional principle of EU law.⁹⁹ The *Viking* and *Laval* rulings established a standard of the protection of the right to strike that is different to that in a number of EU Member States. In this way, *Viking* and *Laval* highlighted the rising influence of EU law in the social area and launched a discussion among scholars and social actors on the implications of these judgments for the protection of social rights in the EU. Indeed, the ECJ did not hold that the right to strike is absolute. On the contrary, it affirmed that the right to strike can be put under some limitations, and must be exercised in conformity with the proportionality principle. In situations when the industrial action affects the exercise of EU fundamental freedoms, the Court subjected the possibility for trade unions to go on strike to a review of the suitability, necessity and *ultima ratio* of the industrial action, and empowered national courts to ‘verify whether the union has exhausted all other avenues under national law before the industrial action is found proportionate.’¹⁰⁰ In the light of the limitations placed by the ECJ on the recognition of the right to strike, the ECJ judgments have faced strong criticism from trade unions (labelling the decisions as ‘anti-social’ and demanding clarification),¹⁰¹ as well as labour lawyers.¹⁰²

4.2 Content of the proposal

Responding to the concerns of stakeholders,¹⁰³ the Commission decided to address the ‘tensions between the freedoms to provide services and of establishment, and the exercise of fundamental rights such as the right of collective bargaining and the right to industrial action’ uncovered by the ECJ’s decisions in *Viking* and *Laval*.¹⁰⁴ On 21 March 2012, the Commission published a proposal for a Council regulation ‘on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services.’¹⁰⁵ The aim of the proposal was to

⁹⁹ Robert O'Donoghue and Bruce Carr, ‘Dealing with Viking and Laval: From Theory to Practice’ (2008) 11 Cambridge yearbook of European legal studies 123.

¹⁰⁰ Case C-438/05 *Viking* para 44; case C-341/05 *Laval un Partneri* para 91. Cf. Catherine Barnard, ‘Viking and Laval: an introduction’ (2007) 10 Cambridge Yearbook of European Legal Studies 463.

¹⁰¹ See Explanatory Memorandum, p. 5.

¹⁰² For example, it has been argued that ‘in neither *Viking* nor *Laval* did the [ECJ] formulate a right to collective action in a manner likely to provide effective legal protection of its exercise. Indeed it could be said that other aspects of the *Viking* and *Laval* judgments render judicial recognition of such a right negligible in terms of its practical effects.’ Tonia Novitz, ‘Human Rights Analysis of the Viking and Laval Judgments’ (2008) 10 Cambridge Yearbook of European Legal Studies 541, 542.

¹⁰³ See an overview in Explanatory Memorandum, p. 7.

¹⁰⁴ *Ibid.*, p. 8.

¹⁰⁵ COM(2012) 130. The proposal drew from the report of 9 May 2010 by former Commissioner Mario Monti (Monti, *A New Strategy for the Single Market*, 9 May 2010) and is hence often labelled as the

‘lay down the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action within the context of the freedom of establishment and the freedom to provide services.’¹⁰⁶

The impact assessment addressed different policy options; however only a regulatory intervention at EU level ‘would have positive economic and social impact’ and ‘provide for more legal certainty’ than a non-regulatory intervention.¹⁰⁷ An EU regulation would ‘most effective[ly] and efficient[ly]’ address the objective of ‘reducing tensions between national industrial relation systems and the freedom to provide services’¹⁰⁸

The Explanatory Memorandum also assessed the legal elements of the proposal.¹⁰⁹ The Commission proposal was based on Article 352 TFEU, with a short justification of lacking ‘explicit provision in the Treaty for the necessary powers.’¹¹⁰ In addition, the Commission explained that, although ‘Article 153(5) TFEU excludes the right to strike from the range of matters that can be regulated across the EU by way of minimum standards through Directives,’ ‘the Court rulings have clearly shown that the fact that Article 153 does not apply to the right to strike does not as such exclude collective action from the scope of EU law.’¹¹¹

The Commission’s reasoning in circumventing the prohibition enshrined in Article 153(5) TFEU seems quite formalistic. The Commission interpreted that provision as only preventing the harmonisation of national labour laws,¹¹² but allowing the EU ‘to clarify the general principles and EU rules applicable to the exercise of the fundamental right to take industrial action within the context of the [single market].’¹¹³ With regard to the subsidiarity principle, the Commission argued that the mentioned objective of clarifying the general principles and EU rules applicable to the right to strike and fundamental freedoms demands EU action, and cannot be achieved

Monti II Regulation. The Monti report was a basis for a number of proposals. Cf. Communication from the Commission, Towards a Single Market Act. For a Highly Competitive Social Market Economy, 27.10.2010, COM(2010) 623, proposal No. 30.

¹⁰⁶ Art 1(1), proposed Monti 2 Regulation.

¹⁰⁷ Commission Explanatory Memorandum, p. 9.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid, p. 10.

¹¹⁰ Ibid, p. 11.

¹¹¹ Ibid.

¹¹² The proposal for EU harmonization of national strike laws had been advanced in the 1970s by Antoine Jacobs, ‘Towards Community Action on Strike Law?’ (1978) 15 Common Market Law Review 129.

¹¹³ Commission Explanatory Memorandum, p. 10.

by Member States alone.¹¹⁴ Additional aspects ensuring the subsidiarity compliance included the role of national courts in deciding on the proportionality of actions; national laws on the exercise of the right to strike were not affected by the proposal and no changes in the existing alternative dispute-settlement institutions at national level were foreseen.¹¹⁵ On proportionality, the proposal did ‘not go beyond what is necessary to achieve the envisaged objectives.’¹¹⁶

The Commission proposal enshrined the so-called ‘Monti clause’ that the regulation shall not affect, in purely internal situations ‘the exercise of fundamental rights as recognised in the Member States, including the right or freedom to strike or to take other action covered by the specific industrial relations systems in Member States in accordance with national law and practices.’¹¹⁷ Next, the central provision of the proposal - Article 2 - provided that ‘[t]he exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms.’ Nonetheless, this provision appeared to basically repeat the general principle of proportionality, used as a standard tool for the reconciliation of conflicting constitutional interests by the Court. Since the application of the principle of proportionality by the ECJ was at the core of the *Viking* and *Laval* rulings (and at the core of the criticism of these decisions) it is difficult to see how Article 2 of the proposal could trigger a change in ECJ’s case law and improve the protection of the right to strike.

The Commission proposal also contained Article 3(1), which established the principle of equal access for cross-border cases to alternative dispute resolution mechanisms in those ‘Member States which, in accordance with their national law, tradition or practice, provide for alternative, non-judicial mechanisms to resolve labour disputes.’

¹¹⁴ Ibid, p. 11.

¹¹⁵ Ibid.

¹¹⁶ Ibid.

¹¹⁷ Art 1(2) of the proposed Monti 2 Regulation (which reproduces the content of Art 2 of the Monti 1 Regulation) does not refer to the notion of purely internal (i.e. intra-state) situation. Given the general purpose of the Regulation of regulating the right to strike in inter-states labour disputes, however, it must be concluded that the provision of Art 1(2) – which proclaims the non-affectation of state right to strike regimes – can only apply to intra-state labour-management disputes in which the EU freedom of establishment and to provide services are not at play.

Article 3(2) encouraged the social partners at the EU level to ‘conclude agreements at Union level or establish guidelines with respect to the modalities and procedures for mediation, conciliation or other mechanisms for the extrajudicial or out-of-court settlement of disputes (...) with a cross-border character.’ Reference to dispute resolution mechanisms could not deprive the parties from access to judicial remedies, after any failure to reach an agreement via the alternative dispute-resolution mechanism.¹¹⁸ The recourse to the dispute-resolution mechanism should prejudice neither the role of national courts in labour disputes, nor the role of the ECJ.¹¹⁹ These provisions perhaps represented the most innovative part of the regulation. Article 3, however, did not give an answer on the uniform availability of the alternative dispute-resolution mechanisms within the EU unless the social partners had agreed on a proper contractual regime of alternative dispute resolutions in transnational labour disputes.¹²⁰ Finally, Article 4 created an alert mechanism in cases of serious damage to the industrial relations system or serious social unrest in a Member State. In such a situation, concerned Member States were to inform both the Member State of the establishment or origin of the service provider, and the Commission, of the current situation.

In sum, seeking to achieve the aim of reconciling the protection of the right to strike with the fundamental freedom and to provide legal certainty in this respect at EU level, the regulation highlighted the question of the EU’s competence to act. The question was whether the Commission proposal was founded on a correct legal basis, and whether the sidestepping of Article 153(5) TFEU was well justified.

4.3 The reasoned opinions of the national parliaments

The Commission proposal for a regulation on the exercise of the right to take collective action was the first to trigger the ‘yellow card’ procedure. Twelve national

¹¹⁸ Art 3(3).

¹¹⁹ Art 3(4).

¹²⁰ Art 3(1) of the proposed regulation allows those Member States that already have mechanisms of alternative dispute resolutions to use them where the labour management dispute is transnational in character. The proposed regulation does not require however those Member States that do not yet have mechanisms of alternative dispute resolutions to introduce them. As a consequence, it would seem that a certain asymmetry is likely to exist between the Member States until the social partners regulate the field with agreements at the EU level.

parliaments issued reasoned opinions, and the opinions of seven unicameral (fourteen votes) and five bicameral (five votes) parliaments amounted to nineteen votes.¹²¹

The major challenge posed by national parliaments to the proposal concerned its legal basis. Concerns about both the application of the flexibility clause (Article 352 TFEU), as well as Article 153(5) TFEU were raised. In the first case, national parliaments assessed that the criteria prescribed by Article 352 TFEU were ‘manifestly not fulfilled’ by the regulation.¹²² Accordingly, the Latvian Saeima¹²³ and the Swedish Riksdag¹²⁴ highlighted that the regulation did not indicate which of the Treaty objectives it wanted to pursue. Similarly, the Belgian Chambre des Représentants,¹²⁵ the Luxembourg Chambre des Députés¹²⁶ and the Portuguese Assembleia da República¹²⁷ opined that Article 352 TFEU was not a justified legal basis for the proposed regulation.

Additionally, concerning the legal basis of the proposal, national parliaments criticised the Commission’s argument that ‘[...] the fact that Article 153 TFEU does not apply to the right to strike does not as such exclude collective action from the scope of EU law.’¹²⁸ For example, the Luxembourgish parliament argued that the right to strike and the right to collective action are ‘categorically excluded’ by Article 153(5) TFEU from EU legislation and that, therefore, Article 352(3) TFEU (which prohibits the use of the flexibility clause for harmonization in areas where harmonization is excluded) applied.¹²⁹ The French Sénat,¹³⁰ the Maltese Kamra tad-Deputati,¹³¹ and the Portuguese Assembleia da República¹³² maintained a similar position. Furthermore, the Danish Folketing¹³³ and the Dutch Tweede Kamer¹³⁴

¹²¹ According to information available on IPEX, the Czech Senát and the Committee for European Affairs in the Czech Poslanecká sněmovna adopted a reasoned opinion after the elapse of eight week deadline. In July 2012, the German Bundesrat and Slovenian Državni zbor issued a negative opinion on the proposal, without declaring it contrary to the principle of subsidiarity. The Polish Senat found a breach of the principle of proportionality only. The Lithuanian and Spanish parliaments and the Italian Senato did not find a breach of subsidiarity, whereas the latter one even endorsed the proposal.

¹²² Finnish Eduskunta, Reasoned opinion of 16.05.2012 on COM(2012) 130.

¹²³ Latvian Saeima, Reasoned opinion of 18.05.2012 on COM(2012) 130, point 3.

¹²⁴ Swedish Riksdag, Reasoned opinion of 11.05.2012 on COM(2012) 130.

¹²⁵ Belgian Chamber of Representatives, Reasoned opinion of 30.05.2012 on COM(2012) 130.

¹²⁶ Luxembourg Chamber of Deputies, Reasoned opinion of 15.05.2012 on COM(2012) 130.

¹²⁷ Portuguese Parliament, Reasoned opinion of 18.05.2012 on COM(2012) 130.

¹²⁸ Commission proposal, par. 3.3.

¹²⁹ Luxembourg Chamber of Deputies, Reasoned opinion of 15.05.2012 on COM(2012) 130.

¹³⁰ French Senate, Reasoned opinion of 22.05.2012 on COM(2012) 130.

¹³¹ Maltese parliament, Reasoned opinion of 22.05.2012 on COM(2012) 130, para 1-2.

¹³² Portuguese Parliament, Reasoned opinion of 18.05.2012 on COM(2012) 130, Part II let. a.

¹³³ Danish Folketing, Reasoned opinion of 3.05.2012 on COM(2012) 130.

highlighted that, even though the proposed regulation did not provide for new mechanisms on the basis of Article 153(5) TFEU, the EU did not have the power to legislate in this area. Finally, the Belgian Chambre des Représentants also signaled that labour law was a national question ‘par excellence.’¹³⁵

Furthermore, in their reasoned opinions, national parliaments questioned the proportionality and the merits of the Commission proposal.¹³⁶ These however, for the purposes of this chapter, are left aside.¹³⁷

4.4 Outcome

On 12 September 2012, less than three months after the Commission took notice of the reasoned opinions and acknowledged that the conditions for the activation of the ‘yellow card’ procedure had been met,¹³⁸ the Commission communicated the withdrawal of the proposal for a regulation on the exercise of the right to strike.¹³⁹ However, in a letter to national parliaments, the Commission stated that it still considered the proposal as compatible with the principle of subsidiarity and the reason for the withdrawal was the possible lack of necessary political support for the proposal in the European Parliament and the Council in the future.¹⁴⁰ Moreover, the Commission explained that the opinions of the national parliaments had raised a

¹³⁴ Dutch Tweede Kamer, Reasoned opinion of 22.05.2012 on COM(2012) 130, p. 2.

¹³⁵ Belgian Chamber of Representatives, Reasoned opinion of 30.05.2012 on COM(2013) 130.

¹³⁶ In the view of the Commission, no arguments on the subsidiarity principle have been raised. Indeed the Commission mentioned in its reply that the arguments put forward by national parliaments in their reasoned opinions, concerned ‘the added value of the draft Regulation, the choice of the legal basis, the EU competence to legislate on this matter, the implications of the general principle included in Article 2 of the draft Regulation and the reference to the principle of proportionality in Article 3(4) and in recital 13 of the draft Regulation, equal access to dispute resolution mechanisms and the alert mechanism,’ concluding that the Commission ‘has not found based on this assessment that the principle of subsidiarity has been breached.’ Cf. Letter of 12.09.2012 from the Commission to the House of Commons, Ares (2012)1058907. For an opposite view see Cooper, *A Yellow Card for the Striker: How National Parliaments Defeated EU Strikes Regulation*, 5. Cooper argues that national parliaments ‘objected to Monti II on the ground that it violated the principle of subsidiarity, although these objections frequently overlapped with broader objections on policy grounds, or to its legal basis.’

¹³⁷ Cf. Fabbrini and Granat.

¹³⁸ See as an example the letter of 12 June 2012 from the Commission to the Belgian parliament, available at <http://www.ipex.eu/IPEXL-WEB/dossier/files/download/082dbcc53782a3ff0137daf67d262db3.do>.

¹³⁹ See the letter by President Barroso to the President of the European Parliament, Mr Martin Schulz, Memo 12/661, 12 September 2012. Yet, this decision was first announced by Commissioner László Andor in the EP Employment and Social Affairs Committee on 11 September 2012.

¹⁴⁰ See as an example the letter of 12 September 2012 from the Commission to the Italian *Senato*, Ares(2012)1058907.

number of issues, but had essentially failed to identify a subsidiarity violation in the Commission proposal.¹⁴¹

In light of lack of any formal communication from the Commission, in October 2012, COSAC asked the Commission for individual responses to the reasoned opinions with an explanation on why, in the view of the Commission, the principle of subsidiarity had not been breached.¹⁴² Hence, in March 2013 in an identical letter to all the national parliaments participating in the first ‘yellow card,’ the Commission attempted to give a more thorough reply to the concerns raised in the reasoned opinions. With regard to the legal basis, the Commission explained that, due to the absence of an explicit provision in the Treaty, it had chosen Article 352 TFEU as a legal basis for the proposal. Moreover, it upheld the earlier argument from the Explanatory Memorandum that the ECJ’s rulings ‘have clearly shown that the fact that Article 153 does not apply to the right to strike does not exclude collective action from the scope of EU law.’¹⁴³ On the choice of a regulation instead of a directive, the Commission underlined that a regulation ‘would have reduced regulatory complexity and offered greater legal certainty.’¹⁴⁴ Finally, on the merits of the proposal, the Commission highlighted the enhanced role of national courts in adjudicating on the proportionality of collective actions, taking into account national laws and procedures on the exercise of the right to strike, encompassing existing alternative dispute-settlement mechanisms. Notwithstanding the foregoing, the introduction of such mechanisms would remain facultative for the informal resolution of labour disputes at the national level.

As such, the Commission replies confirmed that the role of national parliaments under Protocol No. 2 should be limited to a review of the subsidiarity of a legislative proposal, and that in the present case no violation of subsidiarity had taken place. In fact, an assessment of the Commission proposal in light of the material and procedural dimension of subsidiarity demonstrates that the draft regulation was consistent with the core idea of subsidiarity: that action at the EU level should be

¹⁴¹ Ibid. On the interpretation of the Commission reply see also B. Schima, p. 384-385. Schima criticises Commission statement about the failure to identify a subsidiarity issue by national parliaments as ‘apodictic.’

¹⁴² COSAC, 19th Bi-annual Report, at 26.

¹⁴³ See for example Commission reply of 14.03.2013 to the Portuguese parliament.

¹⁴⁴ Ibid.

taken when it cannot be taken by the Member States and, by reason of its scale or effects, can better be pursued by the EU.

Indeed, the transnational labour disputes that were the object of the Commission proposal have a cross-border dimension that cannot be regulated by Member States. While safeguarding national industrial relations regimes in purely internal situations, the Commission proposal established a framework for the management of those conflicts between business and labour that falls outside the regulatory powers of a single Member State, because one of the actors in the conflict is enjoying rights derived from EU free movement law. As cases like *Viking* and *Laval* have demonstrated, national systems of industrial relations are no longer insulated from EU law when the industrial dispute is trans-national in character and one of the parties to the labour-management conflict invokes its free movement rights. The interaction between domestic and supranational law is now such that any meaningful attempt to counter-balance the pressures emerging from EU free market rules must also take place at the EU level.¹⁴⁵ From this point of view, the Commission proposal was an acknowledgement that only an EU act regulating the exercise of transnational industrial action can offer, by reason of its scale and effects, a satisfactory answer to the challenge posed by *Viking* and *Laval*. In other words, because national action in this field would be insufficient, and because supranational action is comparatively more efficient, the proposed regulation fit comfortably with the material requirement of the principle of subsidiarity. Nor did the procedural requirement seem problematic in this case.¹⁴⁶

However, it is clear that the Commission did not expend much effort in its arguments concerning the suitability of the legal basis. Basically, in its replies to national parliaments participating in the first ‘yellow card’ procedure it repeated the arguments from its explanatory memorandum. This is definitely not an exceptional case. The Commission has thus far never been materially influenced by the legal basis

¹⁴⁵ See also Miguel Poiares Maduro, ‘Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU’ in Philip Alston (ed), *The EU and human rights* (Oxford University Press 1999) at 449-472 (explaining that much of the difficulties in protecting social rights in the EU are due to the fact that currently, *national* social rights are balanced with *supranational* free movement rules, and suggesting that the most appropriate response to this situation may be to make the EU the relevant level for the establishment and protection of social rights).

¹⁴⁶ In the abstract, it could be argued that the impact assessments or the explanatory memoranda could have been clearer on the subsidiarity reasoning and could have supported the proposal with specific data. This is, however, harder to expect in cases of proposals that tackle a qualitative rather than a quantitative problem, as in the present case.

arguments raised by national parliaments. The Commission remains firm in its position, maintaining that proposals contribute to the pursued objectives,¹⁴⁷ or do not call into question Member States' competences.¹⁴⁸

Conclusion

This chapter presented how national parliaments acting within the subsidiarity review procedure also verify whether EU legislative acts remain within the limits of the principle of conferral. Such a check upon the existence of EU competence to act is not unexpected, especially taking into account the close links between the principles of conferral and subsidiarity. National parliaments often find Commission proposals as going beyond the conferred competence, and as pursuing an additional, different objective than that indicated in the legal basis. Moreover, the reasoned opinions, which assess the principle of conferral, provide a first account of the areas where national parliaments call for national sovereignty or ascertain an 'exclusive competence' of the Member States. While the reasoned opinions of national parliaments may be interpreted as giving a new perspective on the limits of EU integration from the bottom-up point of view, this chapter pointed out that the assessment of the legal basis of Commission proposals is often very shallow.

Moreover, this chapter analysed the reasoned opinions concerning proposals based on Articles 114 and 352 TFEU, always perceived as a main source of EU 'competence creep.' It is true that the proposals based on the internal market clause have the highest number of reasoned opinions and, in addition, the first 'yellow card' was triggered with regard to the Commission proposal on the right to strike, based upon the flexibility clause. While it was questionable whether the Commission proposal at stake was able to improve the status quo and increase the protection that collective action enjoys in transnational labour conflicts, nonetheless it is not the task of national parliaments to control the legal feasibility of Commission proposals under the EWS pursuant to Protocol No. 2. As I argued in Chapter 2, textual, structural and functional reasons speak in favour of interpreting the role of national parliaments in the EWS as restricted to a control of the subsidiarity of a legal draft only. The Commission reply to the first 'yellow card' also shows that the Commission is drawing a line between

¹⁴⁷ See the replies of the Commission to reasoned opinions on COM(2010) 486.

¹⁴⁸ See the reply of the Commission to the Swedish Riksdag of 07.11.2011 on COM(2011) 121 and of 29.05.2012 on COM(2011) 821.

the subsidiarity-oriented arguments and other points, including those on the suitability of the legal basis.

Chapter 7: The role of national parliaments regarding ‘delegated legislation’

Introduction

The role of national parliaments in the EU legislative process has increased significantly due to the Lisbon Treaty. The national legislatures have evolved into active participants in the scrutiny of the subsidiarity principle, very often even going beyond a strict formal understanding of that mechanism. One unexpected outcome of this active participation of national parliaments in the EU legislative process is the role they claimed with regard to EU executive acts. A total of 47 reasoned opinions¹ take stock of the delegations provided for in the drafts of EU legislative acts submitted by the Commission. The most active reviewers are the Luxembourg Chambre des Députés, with seven reasoned opinions assessing delegations, and the Austrian Bundesrat, Polish Sejm and Senat, each with five reasoned opinions conducting similar assessments.² Yet, this activity of national parliaments has been taken into consideration neither by scholars working on the new role of national parliaments under the Lisbon Treaty, nor by recent studies on delegated and implementing rule making.³

The main aim of this chapter is to offer an overview and assess the concerns of national parliaments on delegations encompassed by Commission proposals. Section 1 briefly presents the concept of delegated and implementing acts as introduced by the Lisbon Treaty. Section 2 moves to an examination of the reasoned opinions issued by national parliaments, encompassing their concerns with regard to both types of delegated legislation – delegated and implementing acts. With regard to delegations by means of delegated acts, a case study of the Commission proposal on the Tobacco

¹ Out of around 256 opinions issued since the Lisbon Treaty entered into force on Commission proposal issued until the end of 2013, and 9 reasoned opinions by August 2014.

² As of August 2014 the reasoned opinions touching upon delegations come from the Lithuanian Seimas (2), Spanish Cortes Generales (1), French Sénat (4) Romanian Chamber of Deputies (2), Swedish Riksdag (2), German Bundesrat (1), Portuguese parliament (1), Italian Senato (2), Greek Parliament (1), Danish Folketing (1), Czech Chamber of Deputies (1), Bulgarian National Assembly (1), Belgian Chambre des Représentants (1), Italian Camera dei Deputati (1), British House of Commons (1), Maltese parliament (1), Dutch Tweede Kamer (1) and Finish Eduskunta (1).

³ See however that COSAC 16th Bi-annual Report of October 2011 mentions this type of scrutiny of national parliaments. With regard to Polish parliament’s scrutiny of the delegations by means of delegated acts (only) see Agnieszka Grzelak and Justyna Łacny, ‘Kontrola przestrzegania unijnej zasady pomocniczości przez parlamenty narodowe–pierwsze doświadczenia’ (2011) 32 Zeszyty Prawnicze 11, 28.

Products Directive is presented. Beyond this case study, this section also provides examples of other concerns voiced by national parliaments, especially on delegations by means of implementing acts and on the distinction between the two types of delegations. Section 3 focuses on the replies of the Commission to the national legislatures, showing the arguments of the Commission rebutting the concerns voiced in the reasoned opinions. In this respect, I divide the arguments of the Commission into those that concentrate on the formal aspects of the delegations, and those that focus on their merits. Finally, Section 4 assesses whether national parliaments should review delegations to adopt delegated and implementing acts under the subsidiarity review procedure at all.

1 Delegated and Implementing Acts

Comitology came into existence in 1960s, when the Council delegated some of its powers to the Commission. The committees of Member States supervised these delegated powers.⁴ The Single European Act (Article 202 EC) for the first time formally recognized committees and enshrined them in the later Comitology Decisions (1999 and 2006). Different types of the comitology committees existed, the involvement of which depended on the policy area: management; regulatory; regulatory with scrutiny; and an advisory committee. The complexity of the comitology system led Weiler & al. to label 'comitology' as 'an apt neologism - a phenomenon that requires its very own science, which no single person has mastered.'⁵

Since the entry into force of the Lisbon Treaty, the EU has a new system of 'delegated legislation.' Specifically, two types of acts 'below that of legislative acts' have been established.⁶ Delegated acts are provided for in Article 290 TFEU and implementing acts in Article 291.⁷ Delegated and implementing acts have been categorized in

⁴ On the development of the comitology system see Adrienne Héritier and others, *Changing Rules of Delegation: A Contest for Power in Comitology* (Oxford University Press 2013) at 4-7.

⁵ Weiler, Haltern and Mayer at 9.

⁶ Paul Craig, 'Delegated acts, implementing acts and the new comitology regulation' (2011) 36 *European Law Review* 671, 672.

⁷ Cf. Adrienne Héritier, 'Institutional Change in Europe: Co-decision and Comitology Transformed' (2012) 50 *Journal of Common Market Studies* 38; Bart Driessen, 'Delegated legislation after the treaty of Lisbon: An analysis of Article 290 TFEU' (2010) 35 *European law review* 837.

different ways in the literature: simply as non-legislative acts;⁸ non-legislative ‘habilitated acts,’⁹ or ‘delegated legislation.’¹⁰ Because of the novelty of the delegated acts, they can be described as ‘a new intermediate level of law-making, between the purely legislative and purely executive.’¹¹ The procedure for implementing acts, in turn, is not that novel, as it remains under the control of Member States, in a similar manner to comitology.

Article 290(1) TFEU states that a legislative act can delegate to the Commission the power to ‘adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act.’ Moreover, as provided by Article 290(2) TFEU, which is also important from the perspective of this chapter, the legislative act should contain the ‘objectives, content, scope and duration of the delegation of power.’ Only the legislative act can provide for the ‘essential elements’ of an area under regulation.¹² Article 290(3) TFEU introduces two safeguards; first, the EP or the Council may decide to revoke the delegation; second, the EP or the Council may express an objection within a period stipulated in the legislative act. Since 2011, the Common Understanding, which builds on the Commission Communication of 2009,¹³ ‘sets out the practical arrangements and agreed clarifications and preferences applicable to delegations of legislative power under Article 290 TFEU.’¹⁴ These concern issues such as consultation of the Commission with the EP and Council when preparing and drawing delegated acts, their

⁸ Thomas Christiansen and Mathias Dobbels, ‘Non- Legislative Rule Making after the Lisbon Treaty: Implementing the New System of Comitology and Delegated Acts’ (2013) 19 *European Law Journal* 42.

⁹ Bast defines habilitated acts as a ‘generic concept for all acts that have their legal basis in another act adopted by the institutions (“basic act”).’ Cf. Jürgen Bast, ‘New Categories of Acts after the Lisbon Reform: Dynamics of Parliamentarization in EU Law’ (2012) 49 *Common Market Law Review* 885, 908.

¹⁰ Robert Schütze, ‘“Delegated” Legislation in the (new) European Union: A Constitutional Analysis’ (2011) 74 *Modern Law Review* 661.

¹¹ Bruno De Witte, ‘Legal instruments and law-making in the Lisbon Treaty’ in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty: EU constitutionalism without a Constitutional Treaty* (Springer 2008) at 92. On the contrary Héritier and others argue that delegated acts under Art 290 TFEU do not constitute a new type of decision making, as they were previously encompassed by a wide notion of implementation in Article 202 EC. The novelty is in the top-down logic of Art 290 TFEU, in contrast to implementation with its bottom-up logic. Cf. Héritier and others at 49.

¹² Case C-355/10 *Parliament v Council* [2012] ECLI:EU:C:2012:516, para 84.

¹³ Communication from the Commission to the European Parliament and the Council, Implementation of Article 290 of the Treaty on the Functioning of the European Union, 9.12.2009, COM(2009) 673 final.

¹⁴ Common Understanding, Council of the European Union, 8753/11, 10.04.2011.

transmission, duration of delegation, periods for objection by the EP and Council and the urgent procedure.

Implementation of EU law can take place either by the Member States themselves, as provided for by Article 291(1) TFEU or, as prescribed by Article 291(2) TFEU, by the Commission (or in some cases by the Council) ‘where uniform conditions for implementing legally binding Union acts are needed.’ Following Article 291(3) TFEU, the EP and the Council enacted Regulation 182/2011, which allows Member States to control the exercise of implementing powers by the Commission.¹⁵ Regulation 182/2011 adopted two procedures: an examination procedure and an advisory procedure depending on the nature or impact of the implementing act¹⁶ and established a new appeals committee allowing the reconsideration of the draft implementing act.¹⁷

2 Assessing Commission proposals with delegations by national parliaments:

A case study of the Tobacco Products Directive

Before embarking on specific analysis of the opinions of national parliaments with regard to both types of non-legislative acts, it should be recalled that Protocol No. 2 to the Lisbon Treaty invests national parliaments with subsidiarity scrutiny of draft legislative acts only.¹⁸ Delegated or implementing acts themselves cannot be assessed within this procedure. In fact, national parliaments receive only the already enacted non-legislative act.¹⁹ Hence, national parliaments may assess only the delegations to adopt a delegated or implementing act, which are enshrined in the ‘basic’ draft legislative act. This assessment takes place at the moment of scrutiny of that ‘basic’ draft legislative act. This scrutiny, however, does not amount to an assessment of the substance of a future delegated or implementing act. The question is whether the

¹⁵ Regulation No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers, Official Journal of the European Union, L55/13. On this regulation cf. Craig at 677.

¹⁶ See Art 2 of Regulation No 182/11.

¹⁷ Art 6 of Regulation No 182/11.

¹⁸ Additionally, Article 1 of Protocol No. 1 grants national parliaments information rights, as they receive consultation documents directly from the Commission the Commission (green and white papers and communications and the annual legislative programme) and any other instruments of legislative planning or policy.

¹⁹ See for example §5 (1)b Gesetz über die Zusammenarbeit von Bundesregierung und Deutschem Bundestag in Angelegenheiten (BGBl. 2012 II S. 1006), according to which the German federal government forwards to the Bundestag legal acts adopted by the Commission on the basis of Art 290 TFEU.

assessment of the delegations for the Commission to adopt the delegated or implementing acts can be conducted within the Early Warning System, the focus of which is the subsidiarity principle. The reasoned opinions invoked in the sections below seem to indicate that national parliaments do not see any obstacle in using the Early Warning System for that purpose.

This section takes the Commission proposal for a directive concerning the manufacture, presentation and sale of tobacco and related products as a case study for the national parliaments' scrutiny of the delegations to adopt delegated acts.²⁰ Section 2.1 presents the merits of this Commission proposal. Section 2.2. turns to the other opinions of national parliaments which provide a vivid illustration of the national parliaments' main criticisms with respect to Article 290 TFEU requirements: the *non-essential elements*; the *duration* of the delegation of power; and the large *number of delegations*. Beyond the case study, this section presents a review of the delegations by means of implementing acts with regard to *matters that can be regulated* in this procedure and the *distinction between the two types of delegations* as understood by national parliaments.

2.1 The Commission proposal

In December 2012, the Commission proposed a directive, which updates and replaces the current Tobacco Products Directive and which, in general terms, aims at improving the functioning of the internal market with regard to tobacco products.²¹ The novelty of the Commission proposal involves a number of its elements.²² With regard to the ingredients, the proposal forbids tobacco products with characterising flavours, such as fruit or chocolate flavours, and additives associated with energy and vitality (e.g. caffeine and taurine), as well as those creating the impression that such

²⁰ Directive of the European Parliament and of the Council on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products, COM(2012) 788.

²¹ Cf. Matthew James Elsmore and Viktoria Obolevich, 'Thank you for not smoking : the Commission's proposal for a new tobacco products directive : legally sound, but does it hit the spot?' (2013) 38 European Law Review 552.

²² Cf. COM(2012) 788, Legal elements of the proposal. For the adopted act see Directive 2014/40/EU of the European Parliament and of the Council of April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC, not yet published in the Official Journal. The directive differs quite substantially from the Commission proposal: the text health warnings will cover 65% instead of 75% of the front and the back of cigarette packs, whilst the controversial prohibition of menthol cigarettes (a characterising flavour) will start after a phase-out period of four years.

products have health benefits. Further, in relation to labelling and packaging, the Commission proposal envisages large health warnings covering 75% of the package, displayed on both sides of the packages of cigarettes and roll-your own tobacco, whereas it exempts other tobacco products from the larger health warnings. The Commission also projected a EU tracking and tracing system at packet level throughout the supply chain, excluding retail. Moreover, the ban of tobacco for oral use remains upheld, with the exception of Sweden; producers of novel tobacco products need to introduce such products through a new notification system; products containing nicotine and herbal products for smoking may be sold only with adapted health warnings.

In relation to the subsidiarity principle, the Commission argued that, as the previous Tobacco Products Directive had already harmonized some of the areas included in the proposal, Member States could not act unilaterally, and hence, only an EU directive could, for example, increase the size of the health warnings.²³ Additionally, the proposal was compatible with the principle of subsidiarity, because in the view of the Commission, Member States subject some of the relevant areas of the proposal, such as labelling and ingredients, to different legal regimes, which in consequence imposes obstacles to the functioning of the internal market.

2.2 Reasoned opinions of national parliaments

Nine chambers in total issued a reasoned opinion to the Commission proposal: the unicameral Bulgarian Narodno sabranie, the Portuguese Assembleia da República, the Danish Folketing, the Hellenic Vouli ton Ellinon, the Swedish Riksdag and four chambers of bicameral parliaments, namely, the Czech Poslanecká sněmovna, the Italian Camera dei Deputati and the Senato and the Romanian Camera Deputailor. These together represented 14 votes out of the 18 required to raise a ‘yellow card’.

2.2.1 Essential elements

The EWS scrutiny of most of the parliamentary chambers issuing reasoned opinions focused to a large extent on the delegated acts foreseen by the Commission proposal and the prohibition of the regulation of *essential elements* of the legislative act by

²³ Cf. COM(2012) 788, pt. 3.9.2.

means of delegated acts.²⁴ As the Bulgarian parliament stated, the essential elements of the act must be included in the legislative proposal and cannot therefore be subject to delegation of power; hence, in its opinion, the proposal was in breach of the principles of subsidiarity and proportionality.²⁵ The chamber specifically disputed the application of delegated acts to change the maximum permitted yields of tar, nicotine and carbon monoxide, adjusting these limitations to scientific development and internationally agreed standards. Moreover, the Bulgarian parliament criticised a number of delegations to the Commission providing for delegated acts to set maximum levels of additives or combinations of additives which cause a characteristic flavour or amplify in an appreciable manner at the stage of consumption the toxic or addictive effect of a tobacco product, empowering the Commission to adopt delegated acts to set maximum levels for such additives (Article 6 paragraph 3 and 9). Additionally, the Bulgarian Narodno sabranie disapproved of the provision that provided that, via a delegated act, the Commission could withdraw the exemptions with regard to additives applicable to tobacco products other than cigarettes, roll-your-own tobacco and smokeless tobacco (Article 6, paragraph 10).²⁶ Further, the chamber disagreed with Article 8, empowering the Commission to adopt delegated acts to adapt the wording of the health warnings to scientific and market and to define their position, format, layout and design. The Bulgarian chamber expressed additional misgivings over the Commission proposal with regard to the combined health warnings (combination of a text warning and a picture) regarding tobacco for smoking (Article 9), where the proposal entrusts the Commission with the adoption of delegated acts to adapt the combined warnings due to scientific and technical developments; establish and adapt the picture library and define position, format, layout, design, rotation and proportions of the combined health warnings. The

²⁴ Not all the parliaments dealt with the problem of delegated powers in their reasoned opinions. The legal basis of the Commission proposal was the main concern of the Italian Camera dei Deputati, Reasoned opinion of 19.02.2013 on COM(2012) 788, which drew attention to the CJEU's jurisprudence on harmonisation measures affecting the protection of human health, specifically in relation to the advertising of tobacco products. Similar arguments were raised the Bulgarian and the Czech chambers. On the contrary, the Italian Senato claimed that Art 114 is the right legal base for the proposal. Another issue not connected to the delegated powers was the prohibition of distribution and sales of oral tobacco which was the main focus of the Swedish reasoned opinion. Cf. Swedish Riksdag, Reasoned opinion of 21.02.2013 on COM(2012) 788. The reasoned opinion of the Danish Folketing was concurring in this regard.

²⁵ Bulgarian Narodno sabranie, Reasoned opinion of 28.02.2013 on COM(2012) 788, pt. 3.

²⁶ All the listed situations where the Commission may regulate by means of delegated acts apply if the Commission gained scientific evidence, experience or if a Commission report establishes a substantial change of circumstances.

final provision criticised – Article 13 – entitled the Commission to define, by means of delegated acts, more detailed rules for the shape and size of unit packets, if these were deemed necessary for the full visibility and integrity of the health warnings before the first opening, during the opening and after reclosing of the unit packet; or to mandate either cuboid or cylindric shapes for unit packets of tobacco products other than cigarettes and roll-your-own tobacco, in case of substantial changes of circumstances, as established in a Commission report. In the view of the Bulgarian chamber, the approach presented in the proposed directive deprives the Member States of ‘the opportunity to implement a policy tuned to their national specificities and societal and cultural differences, in accordance with national health policies.’²⁷

Similarly, the Greek Vouli ton Ellinon and the Italian Senato referred to the delegations by means of delegated act in their reasoned opinions. The Hellenic Vouli ton Ellinon put forward reservations corresponding to those of the Bulgarian parliament, concerning the delegations for the adaptation of maximum nicotine, tar and carbon monoxide yields, claiming that they formed the substantial elements of the Commission proposal.²⁸ Furthermore, the Italian Senato addressed the empowerments to adopt delegated acts and stated that they concern essential elements of the proposal and present ‘an excessive and unjustified’ conferral of power on the Commission.²⁹ Moreover, the Italian Senato estimated that the Commission proposal offers ‘an excess of federal over national regulatory authority’ and encroaches on the competence of national parliaments, by denying them the possibility to assess the subsidiarity and proportionality of the delegated acts.³⁰ Finally, the Portuguese parliament simply stated that ‘the delegation of powers affects essential matters which are the responsibility of Member States to the Commission. This delegation of powers

²⁷ Bulgarian Narodno sabranie, Reasoned opinion of 28.02.2013 on COM(2012) 788, pt. 3.

²⁸ Hellenic Vouli ton Ellinon, Reasoned opinion of 20.02.2013 on COM(2012) 788, p. 5.

²⁹ Italian Senato, Reasoned opinion of 30.01.2013 on COM(2012) 788, p. 1-2. In addition to the points raised by the Bulgarian chamber, the Italian Senato criticised Art 18 (2) and (5), allowing the Commission to update the nicotine quantities in products placed on the market, taking into account scientific developments and marketing authorization and requirements regarding the health warnings, taking into account scientific and market developments and to adopt and adapt their position, format, layout, design and rotation.

³⁰ Ibid.

affects essential matters which are the responsibility of Member States and is carried out in an imprecise manner unclearly related to the Commission's objectives.'³¹

In general, the problem of the notion of *essential elements* is the most common in the reasoned opinions of national parliaments, also beyond this case study. The section below studies also reasoned opinions other than those issued in the Tobacco Directive case. In general, national parliaments foresee a number of suggestions on how to deal with the delegations by means of delegated acts:

1. delegate powers by means of implementing acts instead of delegated ones;
2. refer to the ordinary legislative procedure instead of delegations by means of delegated acts;
3. refer to national measures instead of delegations by means of delegated acts.

First, some national parliaments suggest that the Commission proposals should delegate power to the Commission *by means of implementing acts instead of delegated ones*, where the essential elements are at stake.³² Specifically, the Polish, the Lithuanian and the Luxembourg parliaments furnished this proposal. The Polish Senat focused on the conditions when, in the trade between the Union and third countries, imported agricultural products (which have a special character) are considered as providing an equivalent level of compliance with the Union requirements concerning marketing standards. These conditions, expected to be defined by the Commission in a delegated act, in the view of the Senat, represented a 'significant element' of the regulation, and hence the Commission should establish them by means of implementing acts.³³ Similarly, the Lithuanian Seimas argued in favour of an implementing act instead of a delegated one, to set the principles of controls, sanctions, exclusions and the recovery of undue payments to ensure their efficient application and equal treatment of all beneficiaries in the EAFRD programme. In this case, the Commission decided to amend the provision in the existing regulation, in order to align it to the introduction of the delegated and implementing acts.³⁴ Yet, in the view of the Lithuanian Seimas, the change concerns

³¹ Reasoned opinion of the Portuguese parliament of 1.03.2013 on COM(2012) 788, point 4, English translation available at:

http://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/cm/930/930214/930214en.pdf.

³² This is an obvious legal mistake; only a legislative act can provide for the 'essential elements' of an area under regulation. See Section 1 of this Chapter.

³³ Polish Senat, Reasoned Opinion of 4.02.2011 on COM(2010) 745.

³⁴ COM(2010) 537, Explanatory Memorandum, p. 2.

an ‘essential’ part of the Commission proposal; hence, in consequence, these issues should be regulated by means of implementing acts.³⁵ This represents a way, according to the chamber, to take into account any possible administrative burden on national authorities, operators and citizens. Similarly, the Luxembourg Chambre des Députés negatively assessed the Single CMO proposal and maintained that the Commission should exchange a large amount of empowerments providing for delegated acts for implementing acts.³⁶

Second, national parliaments argue that issues that were supposed to be delegated should be regulated in the basic act and the EU *ordinary legislative procedure* should apply, ensuring the participation of the EP and the Council.³⁷ As the Spanish parliament posits, in arguing for the engagement of the EP and the Council, many of the delegated powers disregard the specific interests of some sectors of the agricultural or fishing policies, and present ‘an impoverishment of the decision making process without a greater effectiveness in the implementation of legislative acts.’³⁸

Third, another possibility foreseen by national Parliaments is that the issues from the delegations should rather be decided by the Member States *through national measures*. With regard to the tobacco advertising directive, the Bulgarian chamber argued that the delegations to adopt delegated acts, ‘take away from Member States the opportunity to implement a policy tuned to their national specificities and societal and cultural differences, in accordance with national health policies.’³⁹ Further, the Polish parliament frequently raises the point that Member States have ‘better knowledge of the local conditions’ and they are more apt to provide the measures initially foreseen in the delegations.⁴⁰

Finally, in a combination of the first and second option, some chambers, like the French Sénat in its reasoned opinion on the General Data Protection Regulation,

³⁵ Lithuanian Seimas, Reasoned opinion of 17.11.2010 on COM(2010) 537.

³⁶ Luxembourg Chambre des Députés, Reasoned opinion of 8.03.2011 on COM(2010) 799.

³⁷ See for example, Luxembourg Chambre des Députés, Reasoned opinion of 8.02.2011 on COM(2010) 738.

³⁸ Spanish parliament, Reasoned opinion of 4.02.2013 on COM(2012) 724, pt. 10.

³⁹ Bulgarian Narodno sabranie, Reasoned opinion of 28.02.2013 on COM(2012) 788, pt. 3.

⁴⁰ Polish Sejm, Reasoned opinions of 25.11.2010 on COM(2010) 537 and COM(2010) 539.

divide issues into those demanding regulation by the EU legislator (e.g. ‘the right to be forgotten’), and other aspects that should be decided at national level.⁴¹

2.2.2 Duration and number of delegations

Coming back to the Tobacco Products Directive, the reasoned opinions of the Bulgarian parliament and the Italian Senato also objected to the *unlimited duration* of the empowerment to adopt delegated acts. Parliaments often stress the absence of limits to the period granted to the Commission to exercise the delegation at stake.⁴²

In addition, an *excessive number of delegations* – sixteen in this case – within one legislative act seemed problematic for some national parliaments.⁴³ A number of chambers, for example the Czech Poslanecká sněmovna, the Greek Vouli ton Ellinon and the Romanian Camera Deputailor, objected to such a large transfer of powers to adopt non-legislative acts on substantial provisions of the proposal to the Commission.⁴⁴ The consequence of such transfers, as highlighted by the Danish Folketing was the imposition of hurdles upon national parliaments concerning the monitoring of the compliance of proposals with the principle of subsidiarity.⁴⁵ Moreover, the comprehensive use of delegated acts, in the view of this chamber, represents an impediment for the assessment of the consequences of the directive and its compatibility with the subsidiarity principle.⁴⁶

⁴¹ French Sénat, Reasoned opinion of 4.03.2012 on COM(2012) 11, p. 3. See also Polish Senat, Reasoned opinion of 3.03.2011 on COM(2010) 799, pt. 16.

⁴² See for example Spanish parliament, Reasoned opinion of 4.02.2013 on COM(2012) 724, pt. 8.; Austrian Bundesrat, Reasoned opinion of 24.05.2012 on COM(2012) 150, p.1.

⁴³ Another example of a legislative act with a large amount of delegations was the the General Data Protection Regulation, where the French Senat and the German Bundesrat in their reasoned opinions underlined the number of delegations provided by the Commission proposal, extending far beyond the objective of comprehensive regulation of European data protection law exclusively by the European legislator. Cf. French Senate, Reasoned opinion of 4.03.2012 on COM(2012) 11, p. 2-3; German Bundesrat, Reasoned opinion of 30.03.2012 on COM (2012) 11, p.2. Similar cases: Austrian Bundesrat, Reasoned opinion of 2.07.2013 on COM (2013)267; Austrian Bundesrat, Reasoned opinion of 5.06.2013 and the Dutch Tweede Kammer, Reasoned opinion of 2.07.2013 both on COM (2013) 262; Luxembourg parliament, Reasoned opinion of 20.05.2014 and Austrian Bundesrat, Reasoned opinion of 14.05.2014, Reasoned opinion of on COM(2014)180, which contained 30 delegations for delegated acts and 12 delegations for implementing acts. See also similar points by the Italian Senato, Reasoned opinion of 26.02.2014 on COM(2014) 4,5.

⁴⁴ Czech Poslanecká sněmovna, Reasoned opinion of 24.01.2013; Hellenic Vouli ton Ellinon, Reasoned opinion of 20.02. 2013, p. 5; Romanian Camera Deputailor, Reasoned opinion of 26.02.2013, p. 1 (English courtesy translation) all on COM(2012) 788. The Slovak Národná Rada raised this issue within the political dialogue.

⁴⁵ Danish Folketing, Reasoned opinion of 4.03.2013 on COM(2012) 788, p. 3.

⁴⁶ Ibid, p. 1-2.

2.2.3 Delegation by means of implementing acts

The delegations by means of implementing acts received only a marginal level of attention on the part of national parliaments in the case of the Tobacco Products Directive.⁴⁷ Nonetheless, beyond this case study, some typical examples of the concerns mentioned in reasoned opinions with regard to delegations by means of implementing acts are due. They concern a list of questions such as:

1. What matters can be regulated by means of implementing acts?
2. Is there a more appropriate procedure for the issues at stake than adopting them by means of implementing acts?
3. How should one distinguish between the issues that should be regulated by means of delegated acts and those that demand an implementation by means of implementing acts?

In general, the reasoned opinions which target delegations to adopt implementing acts raise one main issue: *which matters can be regulated by means of implementing acts?*⁴⁸ A few examples of national parliaments addressing this question are in order.

In the first example, the German Bundesrat put forward that provisions on corrections to tax returns concern procedural law issues and as such cannot be determined by implementing acts.⁴⁹ Another example is the view of the French Sénat, on the delegation by means of implementing acts, which set the measures that the marketing authorisation holder should fulfill with regard to the content and presentation of information on authorised, prescription-only medicines. The Sénat disagreed with implementing acts in this regard, as there is no agreement between the Member States on a common distinction between advertising and information with regard to the marketing of the prescription-only medicines.⁵⁰

What is a more appropriate procedure for the issues at stake than to adopt them by means of implementing acts? While in case of the delegations by means of delegated

⁴⁷ The German Bundesrat, which replied to the Commission proposal within Barroso's 'political dialogue' as the only chamber referred to the delegations to adopt the implementing acts.

⁴⁸ Also the objections of a formal character could be indicated. Specifically, at the moment when the Commission was sending legislative proposals which prescribed an implementing act, the regulation foreseen by Art 291(3) TFEU, was not yet in force. See especially the reasoned opinions of the Polish Sejm on the following Commission proposals of 3.02.2011 on COM(2010) 728; of 4.02.2011 on COM(2010) 738; of 4.03.2011 on COM(2010) 799; of 25.11.2010 on COM(2010) 539; of 25.11.2010 on COM(2010) 537. This criticism lost its relevance as the Regulation No 182/2011 entered into force on 1.03.2011. The Commission indicated this in its replies to national parliaments. See for example Commission reply to the Polish Sejm on COM(2010) 539 of 4.05.2011.

⁴⁹ German Bundesrat, Reasoned opinion of 29.11.2013 on COM(2013) 721.

⁵⁰ French Sénat, Reasoned opinion of 10.04.2012 on COM(2012) 48 and 49.

act, national parliaments would propose a number of alternative ways to regulate the issue at stake, this is not the case for the delegations by means of implementing acts. It might be connected with the fact that changing the delegation from implementing to delegated act would decrease the national influence that national parliaments possess. Hence, the reasoned opinions rather suggest that the issue should be dealt with in the basic legislative act, and should not be delegated by means of delegated or implementing acts. In this way, the participation of the EP and the Council is ensured.⁵¹

Finally, going beyond the case study, the question that national parliaments often deal with in their reasoned opinions is the *distinction between delegated and implementing acts*. According to the Polish Sejm, the Commission did not set criteria enabling the chamber to establish, ‘whether an area will be regulated by means of delegated acts or implementing acts.’⁵² In a like manner, the Lithuanian Seimas with regard to two of the Commission’s proposals on rural development reform and on the support scheme for farmers, considered whether to regulate in form of a delegated act or implementing act, which, it stated, should depend on the delegation of ‘more’ essential powers to the Commission.⁵³

3 Commission’s replies

In order to assess how the Commission deals with the reasoned opinions of the national parliaments regarding ‘delegated legislation’, I will next explore the replies of the Commission.⁵⁴ I divide these into replies with regard to the characteristics of the delegated and implementing acts (essential elements, duration and number of delegations and distinction between delegated and implementing acts) on the one hand, and the explanations given by the Commission with regard to the merits of the delegations on the other hand.

⁵¹ See Belgian Chamber of Representatives, Reasoned opinion of 6.04.2012 on COM(2012) 11, p. 14; Romanian Chamber of Deputies of 24.10.2011 on COM(2011) 453, pt. 6.

⁵² Polish Sejm, Reasoned opinion of 4.03.2011 on COM(2010) 799.

⁵³ Lithuanian Seimas, Reasoned opinion of 17.11.2010 on COM(2010) 537 and Reasoned opinion of 17.11.2010 on COM(2010) 539.

⁵⁴ Replies are available on the webpage of the Commission http://ec.europa.eu/dgs/secretariat_general/relations/relations_other/npo/index_en.htm as well as on IPEX.

3.1 Replies regarding the characteristics of delegations

Old comitology acts needed to be adjusted after the entry into force of the Lisbon Treaty.⁵⁵ In a number of cases where national parliaments maintained that a proposal empowers the Commission to regulate an *essential element* by means of delegated acts, the Commission simply stated that the proposal ‘merely takes account of the fact that the new Articles 290 and 291 TFEU introduce a new system of conferral of powers to the Commission to replace the one provided by the TEC.’⁵⁶ In the view of the Commission, it did nothing more than introduce into the text of the existing regulation the required legal basis for these acts. The Commission sees its role in this respect as only classifying the existing acts under the definition of either delegated acts in the sense of Article 290 TFEU or implementing acts in the sense of Article 291 TFEU. As the Commission puts forward, delegated acts were chosen for cases of ‘quasi legislative acts’ in the sense that they regulate non-essential elements of the legislative act, are of general application and amend or complete the legislative act, whereas implementing acts were selected for acts of an ‘executive’ nature, meaning that Member States are responsible for implementation, and there is a need for uniform application.⁵⁷ In the view of the Commission, it adjusted the original legislative acts according to objective legal criterion of Articles 290 and 291 TFEU; thus, these adjustments concern only non-essential elements of a legislative act.⁵⁸ Consequently, proposed regulations do not grant the Commission any new powers to adopt acts in areas not regulated at the EU level.⁵⁹ Moreover, in order to assuage parliaments, the Commission stressed the guarantees for the EP and the Council, which delimit the delegation of powers to the Commission, as the co-legislators retain control of the delegated power through the possibility of opposing a delegated act adopted by the Commission or even revoking the delegation of powers to the Commission.⁶⁰

⁵⁵ See Section 1 in this Chapter.

⁵⁶ Commission reply of 24.05.2011 to the reasoned opinion of the Polish Sejm on COM(2010) 537.

⁵⁷ Commission reply of 4.05.2011 to the reasoned opinion of the Polish Sejm on COM(2010) 539.

⁵⁸ Commission reply of 18.9.2012 to the reasoned opinion of the Austrian Bundesrat on COM(2012) 150.

⁵⁹ On the Commission’s argument that the aim of the Commission proposal was the adjustment to the Lisbon Treaty see further for example such replies as Commissions reply of 24.05.2011 to the reasoned opinion of the Polish Sejm on COM(2010) 537 or Commission reply of 13.05. 2011 to the reasoned opinion of the Luxembourg Chambre des Députés on COM(2010) 537.

⁶⁰ Commission reply to the reasoned opinions of the Luxembourg Chambre des Députés of 12.09.2011 on COM (2010) 799 and of 15.06.2011 on COM(2010) 738.

In the new legislative proposals, as in the case of the Tobacco Products Directive, the Commission replies to the concerns of national parliaments in a very succinct way, rebutting all their arguments against the delegation of powers with regard to essential elements of the proposal.⁶¹ The Commission maintained that the delegations of power provide for ‘clear and concise criteria, giving limited discretion to the Commission.’ In addition, the Commission fundamentally does not agree with the reasoning that where a delegation concerns, in the view of a national parliament, an *essential element* of the legislative act, it should be regulated by an implementing act rather than a delegated one. The disagreement of the Commission with this approach is visible in the reply to the Lithuanian *Seimas*, which argued in favour of implementing acts regarding some of the provisions of the Commission proposal amending the existing regulation on Support for Rural Development by the EAFRD. In this case, the Commission underlined that the Treaty does not allow for the conferral of powers to the Commission to adopt essential elements of a legislative act by means of implementing acts either; essential elements are ‘the reserved domain of the legislator.’⁶²

The Commission has also highlighted with regard to the *high number of delegations within one proposal* that the TFEU does not set a formal limit on the number of delegated or implementing powers that may be conferred upon the Commission.⁶³

With regard to the *duration of the delegations*, the Commission prefers the lack of constraints involved in the form of a time-limited delegation, because it is hard to foresee the developments and the exact moment of application of the measures.⁶⁴ In its reply to the Italian Senato, it highlights that a limited duration of the delegation of power makes it difficult to achieve the objective of the regulation, ‘as foreseeable innovation and technological developments may at any time require adjustments of the non-essential elements of the legal framework,’ whereas in any case, the EP and

⁶¹ Commission reply to the reasoned opinion of the Italian Senato (25.06.2013), the Greek (25.06.2013) and the Bulgarian parliaments (18.7.2013) on COM(2012)788. See also Commission reply of 13.3.2013 to the opinion of the Italian Senato on COM(2012) 150.

⁶² Commission reply of 8.04.2011 to the reasoned opinion of the Lithuanian Seimas on COM(2010) 537.

⁶³ Commission reply of 22.10.2013 to the reasoned opinion of the Austrian Bundesrat on COM(2013) 267.

⁶⁴ Commission reply of 22.05.2012 to the reasoned opinion of the French Senate on COM(2011) 452.

the Council are always able to revoke the delegation.⁶⁵ In one case, the Commission agreed with the Italian parliament with regard to limiting the period of delegation to five years.⁶⁶

The Commission has also countered the arguments that the *criteria to distinguish between delegated and implemented* acts are not clear, by simply stating that the Treaty envisages this distinction.⁶⁷ Therefore, the Commission does not see the need to ‘repeat the criteria in each and every proposal that aligns an existing regulation to the Treaty of Lisbon.’⁶⁸

3.2 Replies regarding the merits of delegations

With regard to the merits of specific delegations, especially in cases where national parliaments underlined delegation of essential powers, the Commission mainly focused on clarifying the *wrong understanding* of the delegation by a national parliament. In other cases, still sustaining its position, the Commission justified the delegations by a need for *innovation and future technological development; efficiency* or taking away from the Member States the *disproportionate burden* of regulation in all technical topics.

First, in a number of cases the Commission clarified a *wrong interpretation* of delegations by the national chambers.⁶⁹ The Commission proposal amending the Council Regulation on Support for Rural Development by the EAFRD offers an illustration of such a situation. This regulation provided the Commission with the possibility to issue delegated acts to adopt specific conditions for the co-financing of interest rate subsidies and of other financial engineering instruments in order to ensure the efficient use and coherent implementation of the EAFRD.⁷⁰ In this regard, the Polish *Senat* claimed that the issues concerning levels of co-financing of support

⁶⁵ Commission reply of 11.12.2012 to the opinion of the Italian Senato and of 12.3.2012 to the Austrian Nationalrat on COM(2012) 238 (both opinions issued within ‘political dialogue’).

⁶⁶ Commission reply of 6.04.2011 to the opinion of the Italian Senato on COM(2010) 393.

⁶⁷ See Commission reply to the reasoned opinion of the Austrian Bundesrat of 18.9.2012 on COM(2012) 150: ‘The delegated powers were adjusted according to objective legal criterion of Art. 290 and 291. They concern hence only non-essential elements of directives.’

⁶⁸ Commission reply of 24.05.2011 to the reasoned opinion of the Polish Sejm on COM(2010) 537.

⁶⁹ Cf. Commission reply of 13.05.2011 to the reasoned opinion of the Luxembourg Chambre des Députés on COM(2010) 537 regarding Art 36 bis of the proposal; Commission reply of 24.05.2011 to the reasoned opinion of the Polish Sejm on COM(2010) 537 regarding Art 74(4) and Art 86 of the proposal; Commission reply to the reasoned opinion of the Polish Senat on COM(2010) 537 of 15.04.2011 regarding Art 5(2), 5(6), Art 71(5) of the proposal; Commission reply of 25.3.2014 to the reasoned opinion of the German Bundesrat on COM(2013) 721.

⁷⁰ Art 71(5) of COM(2010) 537 proposal.

instruments constitute a vital aspect of Regulation No. 1698/2005 on support for rural development.⁷¹ The Commission replied that the provision criticised by the chamber does not concern the level of the co-financing of support, ‘but rather the adoption of specific conditions for the use and operation of interest rate subsidies and other financial engineering instruments.’⁷²

Another example where the Commission was obliged to clarify the use of delegated acts concerns the proposal amending an existing regulation establishing common rules for direct support schemes for farmers under the common agricultural policy and establishing certain support schemes for farmers.⁷³ One of its provisions empowered the Commission to adapt the rules on the definition in the national legislation for ‘inheritance’ and ‘anticipated inheritance’ by means of delegated acts, in order to clarify specific situations that may occur in the application of the single payment scheme.⁷⁴ In their reasoned opinions, the Polish Sejm and the Senat, the Luxemburgish Chambre des Députés and the Lithuanian Seimas opined that such a delegation interferes with national succession, an area not covered by European Union competence.⁷⁵ The Commission, replying to the chambers, emphasised that it does not have the objective of defining ‘inheritance’ and ‘anticipated inheritance,’ but only of providing a legal basis for the existing provision, which asserts that the definition in the national legislation for ‘inheritance’ and ‘anticipated inheritance’ should be applied.⁷⁶

The second type of argument involved *innovation and future technological development*. In its replies to claims such as the ‘extremely broad-ranging powers to adopt delegated acts relating to almost every one of the most important elements of the proposal,’⁷⁷ as in the Italian Camera dei Deputati assessment of General Data Protection Regulation, the Commission applies the following defence. The Commission asserted that the regulation was ‘deliberately drafted as a technologically

⁷¹ Polish Senat, Reasoned opinion of 25.11.2010 on COM(2010) 537.

⁷² Commission reply of 15.04.2011 to the reasoned opinion of the Polish Senat on COM(2010) 537.

⁷³ COM(2010) 539.

⁷⁴ Art 45a(3)a of the proposal.

⁷⁵ Polish Sejm, Reasoned opinion of 25.11.2010; Polish Senat, Reasoned opinion of 25.11.2010; Luxembourg Chambre des Députés, Reasoned opinion of 30.11.2010; Lithuanian Seimas, Reasoned opinion of 17.11.2010 all on COM(2010) 539.

⁷⁶ Commission reply of 20.04.2011 to the reasoned opinion of the Lithuanian Seimas; of 15.06.2011 to the reasoned opinion of the Luxembourg Chambre des Députés; of 4.05.2011 to the reasoned opinion of the Polish Sejm and of 13.05.2011 to the reasoned opinion of the Polish Senat on COM(2010) 539.

⁷⁷ Italian Camera dei Deputati, Reasoned opinion of 4.04.2013 on COM(2012) 11.

neutral legal instrument,’ ‘to anticipate all technological developments of the next twenty years,’ so the regulation can be supplemented without in every case leading to a revision of the regulation itself.⁷⁸ Moreover, as the Commission maintained in its reply to the German Bundesrat on the same legislative proposals, more detailed rules ‘would result in an inflexible and unwieldy legal text which would not be open to innovation and new technologies.’⁷⁹ Addressing the concerns of national parliaments, the Commission points out that the delegated acts are necessary to provide a ‘flexible legal instrument to ensure legal certainty in an area which is characterised by frequent and unforeseeable technological developments.’⁸⁰

Similarly, the Luxembourgish Chambre des Députés issued a reasoned opinion with regard to the EU legislative proposal concerning the definition, description, presentation, labelling and the protection of geographical indications of aromatised wine products.⁸¹ The chamber claimed that the delegation to the Commission to adopt by means of delegated acts the methods of analysis for determining the composition of the aromatised wine products and the rules to establish whether those products have undergone processes contrary to the authorised production processes, in the absence of such methods or rules, is contrary to the subsidiarity principle.⁸² Furthermore, the reasoned opinion highlighted that this delegation concerns an essential element of the proposal. In its reply, the Commission maintained that the methods of analysis present a technical element and must be regularly updated to comply with the evolution of technology in the domain of products analysis.⁸³

The third approach in the Commission replies is to underline the *efficiency* of delegations. The reply to the reasoned opinion of the UK House of Commons depicts this concept well. In its reasoned opinion on the prudential requirements for credit institutions and investment firms, the House of Commons was hesitant with regard to Article 443 of the proposal, which allowed the Commission to adopt delegated acts imposing stricter prudential requirements for a limited period of time in a number of

⁷⁸ Commission reply of 21.02.2013 to the reasoned opinion of the Italian Camera dei Deputati on COM(2012) 11.

⁷⁹ Commission reply of 10.01.2013 to the reasoned opinion of the German Bundesrat on COM(2012) 11.

⁸⁰ Commission reply of 11.12.2012 to the opinion of the Italian Senato and of 12.3.2012 to the Austrian Nationalrat on COM(2012) 238 (both opinions issued within ‘political dialogue’).

⁸¹ Luxembourg Chambre des Députés, Reasoned opinion of 13.10.2011 on COM(2011) 530.

⁸² Art 3(3) of the proposal.

⁸³ Commission reply of 22.06.2011 to the reasoned opinion of the Luxembourg Chambre des Députés on COM(2011) 530.

cases. This provision, in the opinion of the chamber is ‘an appropriate use of the Commission’s delegated powers under Article 290 TFEU: prudential requirements are not ‘non-essential’ elements of the proposed Regulation.’⁸⁴ Yet, relying on the explicit link between the recommendations or opinions of the parties responsible for monitoring and managing financial stability in the EU and the use of delegated acts by the Commission, in its reply the Commission argued that this connection helps to ensure the efficient and effective use of such powers.⁸⁵

The final argument concerns lifting *the burden of regulation* from the Member States. The Commission argues that leaving the regulation of technical topics to the Member States would be ‘disproportionate and administratively burdensome.’⁸⁶ The Commission sees the regulation by means of delegated acts as a flexible and proportionate approach.

3.3 Assessment of the activity of national parliaments vis-à-vis the Commission

To assess the role of national parliaments as a new interlocutor in ‘delegated legislation’ vis-à-vis the Commission, the issue of the quality of Commission’s replies and the Commission’s willingness to take the comments of national parliaments on board demand further attention.

First, the quality of Commission replies to national Parliaments, especially immediately after the entry into force of the Lisbon Treaty, was not satisfactory. The reasoned opinion of the Polish Senat on the Single CMO regulation proposal illustrates this point well. In this case, the Polish chamber lamented the excessively far-reaching powers to adopt delegated acts and questioned a long list of delegations, in fact drafting its opinion exclusively on that point.⁸⁷ The Commission addressed these claims in a general formula on essential powers, without devoting any effort to assessing each provision mentioned by the Polish chamber.⁸⁸ Moreover, on another

⁸⁴ UK House of Commons, Reasoned opinion of 12.10.2011 on COM(2011) 452.

⁸⁵ Commission reply of 10.07.2012 to the reasoned opinion of the UK House of Commons on COM(2011) 452.

⁸⁶ Commission reply of 22.10.2013 to the reasoned opinion of the Austrian Bundesrat on COM(2013) 267.

⁸⁷ Polish Senat, Reasoned opinion of 3.03.2011 on COM(2010) 799.

⁸⁸ Commission reply of 20.09.2011 to the Polish Senat on COM(2010) 799.

occasion, the Commission did not reply to the concerns of the Luxemburgish parliament with regard to the executive acts.⁸⁹

Second, the effectiveness of the reasoned opinions with respect to the ability to shape the delegation is questionable. The examination of the parliamentary opinions and the Commission's replies seem to show that the Commission has not acknowledged the correctness of any of the points of the parliaments or, consequently, amended any of its proposals, which is compatible with Commission's practice on adjusting or discussing further the proposals critically opined by national parliaments.⁹⁰ Only in one case, did the Commission reply to the national parliament that the Council's general approach had implemented some changes in line with the expectations of that chamber.⁹¹

4 Should national parliaments review the delegations to adopt 'delegated legislation'?

The extensive scrutiny of delegations to the Commission to adopt delegated or implementing acts by national parliaments, as presented in the case study on the new Tobacco Products Directive, shows that the delegations may at first glance seem to aim at the centralization of power at European level, in the hands of the Commission. Many of the reasoned opinions of national parliaments see in the use of the delegations a reduction of national powers to take the necessary action at local level and thus a direct violation of the principle of subsidiarity.⁹²

Yet, the reasons why national parliaments *should not* address the concerns regarding the use of delegations in the reasoned opinions are the following. First, in case of delegated acts, checking whether the delegation in the 'mother act' delegates essential elements, or contesting 'objectives, content, scope and duration of the delegation of power' is a constitutional safeguard, provided by the TFEU for the European Parliament and the Council. It is they who have the power to revoke a delegation or

⁸⁹ Luxembourg Chambre des Députés, Reasoned opinion of 16.11.2010 on COM(2010) 475 and Commission reply of 13.04.2011. Yet, as the chamber criticised the delegated acts only in the preliminary remarks, the Commission might have distinguished it from the subsidiarity violations arguments.

⁹⁰ Cf. Commission Reports: COM(2011) 344, p. 6-11 and COM(2012) 373, p. 8-9.

⁹¹ Commission reply of 12.6.2012 to the reasoned opinion of the French Senate on COM(2011) 650.

⁹² See Austrian Bundesrat, Reasoned opinion of 8.10.2013 on COM(2013) 620; Maltese parliament, Reasoned opinion of 6.11.2013 on COM(2013) 627 concerning delegations by means of delegated acts and French Senate, Reasoned opinion of 30.01.2012 on COM(2011) 650 concerning delegations by means of implementing acts.

express an objection. This is an existing ‘horizontal separation of powers’;⁹³ hence, the subsidiarity review should not apply to this question.

Second, national parliaments are also not competent to review within the subsidiarity mechanism the delegations to adopt implementing acts. In fact, the implementation of EU acts, as provided for by Article 291(1) TFEU, may take place via two alternative routes: at the Member State level by ‘measures of national law necessary to implement legally binding Union acts’ or, at the EU level, as indicated in Article 291(2) TFEU, by the Commission (or exceptionally by the Council) ‘where uniform conditions for implementing legally binding Union acts are needed.’ Of these two avenues of implementation, any criticism by national parliaments regarding implementation at the national level does not concern the subsidiarity principle in any way, as it already chooses the national level over the European level as more apt for regulation. Attacking such an arrangement in a reasoned opinion would thus not reflect a subsidiarity concern.

The second avenue of implementation – by means of EU implementing acts – is thus the more problematic one. Does it still fall under the subsidiarity scrutiny? In this case, we deal with a ‘vertical separation of powers’ between the EU and the Member States.⁹⁴ Yet, the control of implementing acts is already accomplished by the Member States through the committees established in Regulation 182/2011. Thus, as Schütze points out ‘it is thus the Member States directly - not the Union institutions - that take part in the decision-making process.’⁹⁵ It seems that when stating in their reasoned opinions that a delegation by means of implementing acts is a violation of subsidiarity, national parliaments’ concerns are in fact unfounded, as the exercise of control over the implementing acts already lies in the hands of the Member States.⁹⁶

On the last point: national parliaments sometimes highlight that the Commission does not advance sufficient justification that the issues to be regulated by means of delegated or implementing acts are compatible with the subsidiarity principle. This is an important issue for national parliaments, since they do not have a possibility to

⁹³ Schütze, ‘“Delegated” Legislation in the (new) European Union: A Constitutional Analysis’, 690.

⁹⁴ Ibid.

⁹⁵ Ibid at 689.

⁹⁶ Ibid.

conduct such an assessment in the future, as these are non-legislative acts.⁹⁷ Due to the arguments against the control of delegations by national parliaments under the EWS, a justification in the Explanatory Memorandums by the Commission that the delegations are compatible with the principle of subsidiarity seems not necessary.

In sum, it follows from the above that the subsidiarity review should not encompass the question of delegations in Commission proposals, neither as a question of a subsidiarity violation nor as a comment on the merits of the draft delegated acts. The Lisbon Treaty has established sufficient safeguards for delegated and implementing acts.

The participation of national parliaments in the political dialogue presents an avenue that is better suited for raising criticism with regard to the delegated and implementing acts. As the issue of delegations is in fact not a question of subsidiarity, but rather of competence of the Commission to act, national parliaments should address such concerns within the ‘Barroso initiative’ framework. Yet, as it is not an official mechanism, its visibility is also reduced. Moreover, it is directed only to the European Commission, which implies that the EP and the Council have even fewer incentives than in the Early Warning System to take these opinions into account.

Despite these negative points, some of the opinions issued within the political dialogue concern too far-reaching delegations to adopt delegated acts,⁹⁸ delegation of essential elements of the act,⁹⁹ the number of delegations,¹⁰⁰ the duration of the delegation -,¹⁰¹ especially its undetermined period¹⁰² - or the distinction between

⁹⁷ Polish Sejm, Reasoned opinion of 25.11.2010 on COM(2010) 537 and of 4.02.2011 on COM(2010) 738.

⁹⁸ See for example Polish Senate, opinion of 13.03.2013 on COM(2013) 18, pt. 6; Estonian parliament, opinion of 3.05.2012 on COM(2012) 11 (claiming that the right to be forgotten should be regulated by the European legislator); Polish Senat, opinion of 27.03.2012 on COM(2011) 876; Polish Senat, opinion of 14.02.2012 on COM(2011) 866; German Bundesrat, opinion of 2.03.2012 on COM(2011) 866; German Bundesrat, opinion of 16.12.2011 on COM(2011) 615; Irish Houses of Oireachtas, opinion of March 2012 on COM(2011) 370.

⁹⁹ Italian Senato, for example opinion of 1.08.2012 on COM(2012) 150; of 1.08.2012 on COM(2012) 136; of 7.11.2012 on COM(2012) 548; of 18.04.2012 on COM(2012) 89, 90; of 30.11.2011 on COM(2011) 594; of 9.03.2011 on COM(2010) 767, of 1.02.2011 on COM(2010) 539, of 1.02.2011 on COM(2010) 537; of 14.10.2010 on COM(2010) 475; Polish Senat, opinion of 14.02.2012 on COM(2011) 866; Polish Sejm, opinion of 15.04.2011 on COM(2011) 79; German Bundesrat, opinion of 2.03.2012 on COM(2011) 866; opinion of 14.10.2011 on COM(2011) 370; Romanian Senat, opinions of 24.11.2010 on COM(2010) 537 and 539; Czech Senate, opinion of 26.01.2011 on COM(2010) 484; opinion of 20.05.2010 on COM(2010) 119.

¹⁰⁰ See for example Austrian Nationalrat, opinion of 4.09.2012 on COM(2012) 238; Italian Senato, opinion of 13.06.2012 on COM(2012) 11; Romanian Camera Deputatilor, opinion of 27.04.2011 on COM(2011) 615; German Bundesrat, opinion of 16.12.2011 on COM(2011) 615.

¹⁰¹ See for example Italian Senato, opinion of 21.11.2012 on COM(2012) 350 and COM(2012) 360.

delegated and implementing acts.¹⁰³ To a lesser extent, the opinions criticise the delegations to adopt the implementing acts.¹⁰⁴ It is worth mentioning that the Italian parliament is very active in the political dialogue and issues the vast majority of such opinions. The argument advanced by the chamber is that the Commission proposals encompassing a delegation comply with subsidiarity, as only the EU can amend European legislation and update it to the new procedures of delegated acts and implementing acts introduced by the Lisbon Treaty.¹⁰⁵ Moreover, some of them are positive, pointing at the conformity of delegations with Article 290 TFEU¹⁰⁶ and praising the ‘best practice’ of the application of delegated acts in some cases.¹⁰⁷

Conclusion

The purpose of this chapter was to demonstrate the role that national parliaments have adopted with regard to the new rules of delegation. The reasoned opinions on subsidiarity issued in the process of Early Warning System under Protocol No. 2 to the Lisbon Treaty allow for the highlighting of the main issues that concern national parliaments with regard to delegated and implementing acts. The directive proposed by the Commission on the manufacture, presentation and sale of tobacco and related products aptly summarises the core concerns of national legislatures with regard to delegated acts. Specifically, the delegation of powers beyond the regulation of non-essential elements of a proposal, as well as the duration and the excessive number of delegations lie at the heart of national parliaments’ concerns. Further, with regard to implementing acts, the major problems relate to the matters that implementing acts may regulate, and the use of delegated acts instead of implementing ones.

Against this background, the Commission pre-eminently argues that the delegated and implementing acts are a necessary adjustment to the distinctions introduced by the Lisbon Treaty, without creating any new competence for the EU. Moreover, on the

¹⁰² See for example Italian Camera dei Deputati, opinion of 23.06.2011 on COM(2011) 118; Italian Senato, opinion of 1.08.2012 on COM(2012) 238 and COM(2012) 150; of 18.12.2012 on COM(2011) 895, 896 and COM(2011) 897; of 2.03.2011 on COM(2010) 775; Romanian Senat, opinion of 30.11.2011 on COM(2011) 615; of 24.11.2010 on COM(2010) 537 and 539; German Bundesrat, opinion of 16.12.2011 on COM(2011) 615.

¹⁰³ Cf. German Bundesrat, opinion of 26.11.2010 on COM(2010) 539 and 537.

¹⁰⁴ See for example Czech Senate, opinion of 8.02.2012 on COM(2011) 880.

¹⁰⁵ See for example Italian Senato, opinion of 28.11.2012 on COM(2012) 403.

¹⁰⁶ See for example Italian Senato, opinion of 18.12.2012 on COM(2012) 584; of 21.11.2012 on COM(2012) 530; of 29.11.2011 on COM(2011) 555; of 16.06.2011 on COM(2011) 8; of 2.03.2011 on COM(2010) 761; of 3.11.2010 on COM(2010) 505.

¹⁰⁷ Italian Senato, opinion of 8.02.2012 on COM(2011) 866.

merits of specific delegations, especially in the cases where national parliaments underlined the delegation of essential elements of the legislation, the Commission focused on clarifying their erroneous interpretation by national parliaments. In other cases, defending its position, the Commission promoted the need for openness to technical innovation and efficiency.

This chapter has also negatively assessed in legal and political terms the application of subsidiarity review to the scrutiny of delegations in Commission proposals. As has been argued, with regard to delegations by means delegated acts, not only is it a question of ‘horizontal division of power,’ but it is also the EP and the Council that were granted a competence to revoke or object to the power of the Commission. Finally, concerning the delegations to adopt implementing acts, the control of such implementing powers is already in the hands of the Member States.

Chapter 8: The Role of National Parliaments in Fundamental Rights Protection under Protocol No. 2

Introduction

The content of the reasoned opinions of national parliaments issued under the EWS introduced by the Lisbon Treaty shows that fundamental rights protection does not only affect the courts. Legislative acts proposed by the Commission, including those the main objective of which is fundamental rights protection, are reviewed for their consistency with the subsidiarity principle. Taking into account that parliamentary chambers increasingly address fundamental rights issues, this chapter investigates the relationship between the subsidiarity review mechanism and fundamental rights protection. *How does the subsidiarity principle relate to fundamental rights protection? Under which circumstances is one level more apt to protect them than the other?*

In order to apply the subsidiarity principle in the field of fundamental rights protection, two assumptions are necessary: first, the EU does not have an exclusive competence in fundamental rights protection; and second, the EU competence is subsidiary to the protection offered in this regard at the national level.¹ Following the principle of subsidiarity, the level at which the protection of fundamental rights can be better achieved, should prevail over that where it cannot be sufficiently safeguarded. In addition, as von Bogdandy pointed out, a ‘forceful and comprehensive human rights policy’ can, however, violate the subsidiarity principle.²

This chapter is structured as follows: the first section starts with a short review of the fundamental rights standards of the EU with an insight into the guidelines established by the Commission for legislative drafts in this regard. The main sections reflect three possible configurations in which national standards of fundamental rights protection relate to those pursued by Commission proposals. Hence Section 2.1. focuses on the reasoned opinions of national parliaments to Commission proposals where fundamental rights are not the objective of the act at stake. Then, Section 2.2 looks at

¹ Leonard FM Besselink, ‘Entrapped by the maximum standard: on fundamental rights, pluralism and subsidiarity in the European Union’ (1998) 35 Common Market Law Review 629, 677.

² Armin von Bogdandy, ‘The European Union as a human rights organization? Human rights and the core of the European Union’ (2000) 37 Common Market Law Review 1307, 1317.

the reasoned opinions concerning proposals where fundamental rights are one of the objectives pursued by the EU draft legislative act. In Section 3, I explore the setting in which fundamental rights protection is the main objective of a draft legislative act. To this end, this chapter takes the Commission proposal ‘Women on boards’ as a case study of subsidiarity scrutiny in the field of fundamental rights. The assessment of the applicability of the subsidiarity mechanism in the field of fundamental rights protection follows in Section 4.

1 Fundamental rights standards in the EU

The ‘functional legal order’ of the Community aimed at economic integration of national economies and was ‘not meant to *protect*, but rather to *change* [democratic societies].’³ As von Bogdandy explains further, step-by-step, human rights ‘were (...) introduced as limits to the discretion of the supranational institutions.’ The ambition became, however to make ‘human rights (...) *determine* rather than simply *limit* the European legal system and would move to the forefront of its institutions’ activity,’ placing them at the core of the Community order. Yet, before the EU Charter of Fundamental Rights was proclaimed, it was first the jurisprudence of the ECJ and the provisions of the Treaty itself, for example Article 141 EC (now Article 157 TFEU), that enhanced the position of human rights in the Community.⁴ The subsequent amendments, especially the Amsterdam Treaty and the introduction of Article 6 TEU, further strengthened fundamental rights in the EU.⁵ With the Lisbon Treaty, Article 6 TEU was adapted, and fundamental rights became its sole focus. Each paragraph of this provision refers to a different fundamental rights source, depicting three ‘Bills of Rights’: the EU Fundamental Rights Charter, the European Convention of Human Rights, and fundamental rights as general principles of EU law resulting from the constitutional traditions common to the Member States.⁶

In particular, Article 53 of the Charter states that ‘nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application (...) by the Member States’ constitutions.’ This indicates that the Charter is meant to be an additional

³ Ibid at 1308.

⁴ Craig, *The Lisbon Treaty: law, politics, and treaty reform* at 193-195.

⁵ Ibid at 195.

⁶ Robert Schütze, ‘Three ‘Bills of Rights’ for the European Union’ (2011) 30 Yearbook of European Law 131.

system of fundamental rights protection, without threatening the existing standards, more specifically ‘existing regimes should not be applied and interpreted ‘downwards’ by invoking the language of the Charter.’⁷ In the Court’s interpretation, Article 53 of the Charter ‘confirms that, where an EU legal act calls for national implementing measures, national authorities remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised.’⁸ In sum, national standards of fundamental rights protection will apply, as long as they comply with primacy, unity and effectiveness of EU law, which in consequence means that ‘state-specific constitutional guarantees stand no chance of survival when they collide with the standards set by the Charter.’⁹

Against this broader structure of EU fundamental rights protection, this chapter concentrates specifically on the EU legislative procedure, looking into how fundamental rights are protected within it. In particular, it is worth exploring how the Commission attempts to safeguard them in the preparation of legislative proposals.

Since the Charter of Fundamental Rights gained a legally binding character with the entry into force of the Lisbon Treaty, the Commission has prepared a Strategy Paper for its departments with a set of guidelines ‘to make the fundamental rights provided for in the Charter as effective as possible.’¹⁰ Accordingly, the Commission departments should highlight the fundamental rights aspects in preparatory consultations (e.g. green papers), in impact assessments and in the drafting of legislative proposals (in recitals of the preamble and the explanatory memorandum to the proposals). Similarly, throughout the legislative process ‘the Commission is ready to help other institutions find an effective way to take into account the effects of their amendments on the implementation of the Charter.’¹¹

In 2011, in addition to the Strategy Paper, the Commission introduced a complimentary document, the Operational Guidance, focusing on the fundamental

⁷ Bruno De Witte, ‘Article 53, Level of protection’ in Steve Peers and others (eds), *The EU Charter of fundamental rights: a commentary* (Oxford: Hart Publishing 2014).

⁸ Case C-399/11 *Melloni* [2013] ECLI:EU:C:2013:107, para 60.

⁹ Filippo Fontanelli, ‘National Measures and the Application of the EU Charter of Fundamental Rights—Does curia. eu Know iura. eu?’ (2014) 14 Human Rights Law Review 231, 263.

¹⁰ Communication from the Commission, Strategy for the Implementation of the Charter of Fundamental Rights by the European Union, 9.10.2010, COM(2010) 573.

¹¹ *Ibid*, point 1.2.

rights justification in impact assessments.¹² The operational Guidance gives examples for the drafters of impact assessments that illustrate how to approach fundamental rights at different stages; while consulting interested parties or examining the impact on fundamental rights of the different policy options.

The effectiveness of this type of guidelines seems limited, however. First, it has been argued that the directorates do not always recognize that a fundamental right may be at stake and the consultation with other parties does not always safeguard that these issues will be taken into account.¹³ Moreover, another type of criticism is that impact assessments are ‘superficial’ on fundamental rights, and are not necessarily corrected after consultation with the Commission’s legal service.¹⁴ This problem might be connected with the nature of fundamental rights, because of the value assessment involved, which this chapter elaborates upon in Section 4, below. Before that, however, it is necessary to look into the assessment of fundamental rights aspects in the Commission proposals by national parliaments.

2 Application of the subsidiarity principle to Commission proposals touching upon fundamental rights

The involvement of national parliaments in the scrutiny of the fundamental rights standards of the Commission’s proposals has implications for the EU institutional balance. In fact, national parliaments can be seen as a new counterpart for the ECJ, engaging in the question of fundamental rights protection.¹⁵ In this light, the involvement of national parliaments can be seen as adding – next to the EP and the Council – to the politicisation of fundamental rights in the EU.

Quite distinctively, the growing EU legislation, with implications for the protection of EU fundamental rights, has been explored by the EU scholarship less than, for example: the interaction between different sources of EU fundamental rights; the scope of application of the Charter; or the horizontal application of its provisions.¹⁶

¹² Commission Staff Working Paper, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments, SEC(2011) 567 final, 6.5.2011, at 5, available at: http://ec.europa.eu/governance/impact/key_docs/docs/sec_2011_0567_en.pdf.

¹³ Israel de Jesús Butler, ‘Ensuring Compliance with the Charter of Fundamental Rights in Legislative Drafting: The Practice of the European Commission’ (2012) 37 European Law Review 397, 417.

¹⁴ Ibid.

¹⁵ See Muir arguing in this vein in relation to increased number of fundamental rights legislation and involvement of the EP and Council. Elise Muir, ‘The Fundamental Rights Implications of EU Legislation: Some Constitutional Challenges’ (2014) 51 Common Market Law Review 219, 221.

¹⁶ Ibid at 220.

Muir divides the EU fundamental rights legislation into two groups: first, setting fundamental rights standards, and second, concerning fundamental rights protection on a specific subject matter.¹⁷

Partially building upon Muir's division, I propose to divide fundamental rights into three groups, depending on the type of Commission draft legislative act to which national parliaments issued their reasoned opinions. Since the focus of the application of the subsidiarity principle in Article 5(3) TEU is on achieving the objectives of the Treaties, the main criterion for the division between different groups of proposals is whether the objective of such a legislative proposal is the protection of fundamental rights. Accordingly, first, I will consider the submissions of national parliaments concerning Commission proposals without a fundamental rights objective (Section 2.1.), and then those where fundamental rights are one of the objectives (Section 2.2.). The main focus will be on the 'genuine' fundamental rights legislation with a case study of the 'Women on Boards' proposal (Section 3).

2.1 Commission proposals without a fundamental rights objective

This section gives an overview of reasoned opinions in which national parliaments assess fundamental rights issues in legislative proposals that have no fundamental rights objective. Despite this, the argument put forward by national parliaments is that the level of protection proposed by the Commission is not satisfactory. Specifically, in the view of national parliaments, a draft legislative act may violate fundamental rights provided for in the EU Charter or the ECHR, as well as in a Member State's constitution, and hence lead to a violation of the subsidiarity principle and the issuing of a reasoned opinion.

As an example of reasoned opinions claiming infringement of fundamental rights, we may examine the Commission proposal establishing the European Public Prosecutor Office.¹⁸ The objective of this proposal was the effective fight against offences affecting the Union budget.¹⁹

In what turned out to be the second 'yellow card' ever triggered, some of the national parliaments found that the Commission proposal infringed upon a number of

¹⁷ Ibid at 221.

¹⁸ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534.

¹⁹ See Explanatory Memorandum, point 3.3.

fundamental rights. The Cypriot House of Representatives found that rights of suspects are insufficiently protected under the proposal, as it includes investigative measures that are not allowed ‘under the national law of all Member States.’ Similarly, the Czech Senate highlighted a possible violation of a number of fundamental rights. The first infringement concerned the right to a lawful judge, ‘due to [the] broad discretion’ of the EPPO in the choice of the competent national court; the second referred to the right to a fair trial, because of the single-instance decision-making of the EPPO, the absence of appellate procedures, and the procedure for adjudication on the objection of prejudice of the EPPO.²⁰ In addition, the Czech parliament found these aspects as compromising the fundamental rights protection under the national constitution and the EU Charter.²¹

In its replies to national parliaments, the Commission included the opinions concerning fundamental rights into the group of arguments ‘other than subsidiarity violations’ and hence falling outside the scope of the subsidiarity control mechanism. Nonetheless the Commission promised that these arguments will be ‘duly taken into account in the process of negotiating the Proposal and will be addressed in the political dialogue, and namely in the individual replies to be sent to the relevant national Parliaments.’²² Acting through the Barroso dialogue, the Commission pointed out that Article 11(1) of the proposal ensures that the activities of the EPPO respect the rights enshrined in the Charter. Specifically, with regard to the Cypriot concern on investigative measures, the Commission underlined that the proposal enshrines a catalogue of instruments available to the EPPO and applicable in all Member States, which safeguard legal certainty, coherence in investigation and will stop the fragmented use of investigative measures in crimes with an EU dimension.²³ In addition, the most intrusive investigative measures will demand the authorisation of a national court. With regard to the Czech reasoned opinion, the Commission

²⁰ Czech Senate, Reasoned opinion of 9.10.2012 on COM(2013) 534, point II 6.

²¹ On the margin, it has to be underlined that national parliaments are not isolated in their criticism of the EPPO proposal concerning the fundamental rights guarantees. The EU Fundamental Rights Agency has expressed similar concerns concerning in particular the judicial review of the EPPO’s action, defence rights and victims’ rights. Cf. *Opinion of the European Union Agency for Fundamental Rights on a proposal to establish a European Public Prosecutor’s Office*, FRA Opinion 1/2014, 4.02.2014.

²² Communication from the Commission to the European Parliament, the Council and the National Parliaments on the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No. 2, COM(2013) 851 final point 2.1.

²³ Commission reply of 13.3.2014 to the reasoned opinion of the Cypriot parliament on COM(2013) 534.

underlined that the right to a lawful judge is not compromised because the EPPO is a national authority for the purposes of judicial review.²⁴ The ECJ can interpret the regulation and ensure uniform application via the preliminary reference procedure. Judicial review also applies to the choice of jurisdiction. With regard to the right to a fair trial, Article 27 of the proposal provides clear strict and objective criteria, leaving the EPPO limited discretion. The cases of conflict of interest can be brought before the EPP and the case might then be reassigned. Moreover, the EDPs, EPP or his deputies might be dismissed.

While the reasoned opinions in the EPPO case evidently addressed fundamental rights constraints as a subsidiarity violation, a contrasting example is provided by the reasoned opinion of the Swedish Riksdag on the Commission proposal for a regulation on measures to reduce the cost of deploying high-speed electronic communications networks, which aimed at ‘facilitat[ing] and incentivis[ing] the roll-out of high-speed electronic communications networks’ and was based on Article 114 TFEU.²⁵ The chamber assessed the proposal negatively, pointing out that ‘certain parts of the proposal are wide-ranging and intrusive, mainly regarding the right of landowners and the protection of ownership rights.’²⁶ Nevertheless, the Riksdag agreed with the Commission’s assessment that the subsidiarity principle had not been violated, because only the EU level may improve the conditions for the implementation and function of the internal market in that area.²⁷ The Swedish example seems, however, to be an isolated case. In the EPPO case, the fundamental rights arguments seems to be one of many raised in the reasoned opinions tipping the balance towards a subsidiarity violation, while in the Riksdag’s reasoned opinion, a clear line between a subsidiarity violation and fundamental rights is drawn.

In sum, these examples show that reasoned opinions often include general comments on the consequences of Commission proposals for fundamental rights. However, the points raised by national parliaments do not concern the question of which level, the EU or Member States, is more apt to achieve the objective of the Treaties, such as the fight against EU fraud or deploying high-speed electronic communications infrastructure to improve the conditions for the establishment and functioning of the

²⁴ Commission reply of 13.3.2014 to the reasoned opinion of the Czech Senate on COM(2013) 534.

²⁵ COM(2013) 147, see Art 1 of the proposal.

²⁶ Swedish Riksdag, Reasoned opinion of 30.05.2013 on COM(2013) 534.

²⁷ It could be however questioned whether the opinion of the Swedish Riksdag can be perceived as a reasoned opinion when no subsidiarity violation has been argued.

internal market. In consequence, in accordance with the textual, structural and functional arguments raised in favour of a narrowly designed subsidiarity review, the matters exemplified in this section concern the substance of the proposal and should not be addressed in the reasoned opinions directed to the Commission. In turn, national parliaments may raise these fundamental rights questions within the political dialogue, which seems a more apt forum in this regard.

2.2 Fundamental rights as one of the objectives of the proposal

The second type of configuration of the relationship between the national standards of fundamental rights protection and those offered by a Commission proposal concerns situations in which the EU draft legislative act in question aims at achieving a number of Treaty objectives, only one of them being fundamental rights protection. This section will elaborate upon this issue, taking a closer look at the Commission proposals on data protection and third country seasonal workers.

The first example concerns the General Data Protection Regulation.²⁸ The objective of this proposal was twofold: first, to provide rules relating to the protection of individuals with regard to the processing of personal data, and second, to offer rules relating to the free movement of personal data.²⁹ When assessing this proposal, the members of the Bundesrat contended that the Commission proposal lags behind German regulation in this area. Specifically, German law already offers ‘nuanced data protection guarantees, which are more readily enforceable and offer a higher degree of legal security than the highly abstract individual provisions of the draft Regulation.’³⁰ The Belgian Chambre des Représentants raised an identical argument on the higher level of data protection in Belgium, including in the public sector.³¹ Hence, the directive should ‘clearly demonstrate that it sets only a minimum standard while allowing national legislators to provide a higher level of protection, particularly in the areas of government, social security and health’. Finally, the French Senate maintained, in general terms that ‘in the area affecting the rights of citizens, the proposed regulation should not prevent Member States of the possibility to

²⁸ COM(2012) 11.

²⁹ Art 1(1) of the proposal.

³⁰ German Bundesrat, Reasoned opinion of 30.03.2012 on COM(2012) 11. Cf. also Bundesrat Stenografischer Bericht of 30.03.2012 at 180.

³¹ Belgian Chambre des Représentants, Reasoned opinion of 6.04.2012 on COM(2012) 11, par.2 in Rapport fait au nom de la Commission de la Justice, DOC 53 2145/001, p. 13.

temporarily maintain more protective national provisions so that EU-wide harmonization will not lead to a decreased protection.’³²

The second example discusses the directive on third-country seasonal workers. This directive attempted to manage migration flows, by setting transparent rules for the admission and stay to protect them from social dumping.³³ First, some national parliaments condemned the proposal as granting rights to third-country nationals that are too low to diminish the possibility of wage and social dumping.³⁴ For example, in comparison to the directive, Austria has granted seasonal workers the same rights as their own nationals, in order to prevent their abuse. Further, the Dutch chambers expressed a differentiated view with regard to the directive. On the one hand, the houses declared that ‘the exploitation and irregular conditions of employment of seasonal workers from third countries must end.’³⁵ On the other hand, the parliament maintained that European and global (ILO) agreements sufficiently protect the socio-economic rights of seasonal workers. To contest the proposal, the Czech Senate went even further. The Czech chamber focused specifically on the equal treatment with nationals of the hosting Member States with regard to such issues as freedom of association and affiliation and membership of an organisation representing workers, social security and the benefits defined in Article 3 of Regulation (EC) No 883/04 on the coordination of social security systems; the payment of statutory pensions based on the worker's previous employment; access to goods and services; and the supply of goods and services made available to the public.³⁶ The parliament underlined that ‘it cannot be precluded that in the area of social welfare the guarantees of seasonal workers’ rights (...) will lead to [a] higher level of protection of seasonal workers from third countries than of the citizens from the new Member States to which the transitional periods regarding access to labour markets are still being applied.’³⁷ In the same vein, the Polish Senat argued that the obligation upon the employers of seasonal workers to provide evidence that the seasonal worker will have accommodation

³² French Senate, Reasoned opinion of 4.03.2012 on COM(2012) 11 (own translation).

³³ COM(2010) 379.

³⁴ Austrian Bundesrat, Reasoned opinion of 5.10.2010 and Austrian Nationalrat, Reasoned opinion of 14.9.2010 on COM(2010) 379.

³⁵ Dutch Eerste and Tweede Kamer, Reasoned opinion of 14.10.2010 on COM(2010) 379.

³⁶ Art 16(2) of the proposal.

³⁷ Czech Senate, Reasoned opinion of 22.06.2010 on COM(2010) 379.

ensuring an adequate standard of living, is more far-reaching compared to conditions applicable to local and other Member States' workers.³⁸

These two examples allow us to conclude, first, that the fundamental rights questions raised by national parliaments with regard to Commission proposals with mixed objectives clearly show that subsidiarity can be violated according to parliaments both because the proposed EU standard might be too high or too low. For example, in case of data protection only the Member States with standards that are supposedly higher than the European one reacted, whereas in the case of seasonal workers which touches upon socio-economic rights, two sides of the parliamentary spectrum were active. On the one hand parliaments of Member States that are destinations for cheap labour (e.g. the Netherlands), and on the other hand those that provide this labour (Poland, Czech Republic) participated in the subsidiarity scrutiny.

Second, because 'non-economic common objectives,' such as fundamental rights protection, may coexist in Commission proposals next to other objectives, such as 'market objectives' on the elimination of obstacles to trade or distortions of competition, or as in the examples above, the free movement of data or the management of migratory flows, it is often not easy to delineate two or more objectives from each other.³⁹ National parliaments may thus raise concerns about the fundamental rights in their reasoned opinions, as long as these are within the subsidiarity assessment. However, the next section will show that the subsidiarity assessment of fundamental rights proposals may not be a straightforward task, because of the value choices enshrined in this reasoning.

3 Case study of a 'genuine' fundamental rights legislation

The case study of the 'Women on boards' proposal exemplifies the third type of relationship between the subsidiarity principle and fundamental rights. The proposal represents a type of draft legislation where fundamental rights protection is the main objective. The fundamental right at stake in this case study is gender equality with a specific focus on public company boards. At first glance, gender equality might be

³⁸ Polich Senat, Reasoned opinion of 21.10.2010 on COM(2010) 379.

³⁹ De Witte, 'A competence to protect. The pursuit of non-market aims through internal market legislation' at 26.

seen to have more of an economic justification than a social or moral one.⁴⁰ Nonetheless, as Barnard explains, the adoption of directives on equality and the ECJ's jurisprudence has given the principle of equality the status of a fundamental right, with a dual economic and social role.⁴¹

3.1 Divergent standards at national level

The financial crisis triggered the review of corporate governance codes; diversity in corporate boards became a new issue, indeed '[t]he policy focus in Europe is almost entirely on gender diversity.'⁴² Member States have taken divergent approaches to the position of women on boards: some introduced binding legislation, others non-binding corporate governance codes, while still others remained inactive. Eleven EU Member States (Belgium, France, Italy, the Netherlands, Spain, Portugal, Denmark, Finland, Greece, Austria and Slovenia) undertook legislative measures to increase gender equality in corporate boards.⁴³

Following Norway, a pioneering non-EU Member State, France, Italy and Belgium introduced binding legislation on women quotas. France is currently the Member State with the highest proportion of women on the company boards.⁴⁴ The binding quota adopted in 2011 is set to reach 40% by 2017, with an intermediate target of 20% by 2014, and applies to all listed companies and large unlisted companies.⁴⁵ Non-compliance with these quotas will invalidate appointments, except for those of women.⁴⁶ However, decisions taken by boards in violation of the quota would remain valid. Also in 2011, Italy approved a quota of 1/3 for female members of boards in all stock exchange listed companies and state companies by 2015.⁴⁷ The sanctions

⁴⁰ Catherine Barnard, 'Gender Equality in the EU' in Philip Alston (ed), *The EU and human rights* (Oxford University Press 1999) at 217.

⁴¹ Ibid.

⁴² Paul L Davies and Klaus J Hopt, 'Corporate Boards in Europe—Accountability and Convergence' (2013) 61 *American Journal of Comparative Law* 301, 326.

⁴³ European Commission, Memo, Questions and Answers: Proposal on increasing Gender Equality in the Boardrooms of Listed Companies, 14.11.2012.

⁴⁴ Cf. Overview in Julie C Suk, 'Gender parity and state legitimacy: From public office to corporate boards' (2012) 10 *International journal of constitutional law* 449, 451.

⁴⁵ Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d'administration et de surveillance et à l'égalité professionnelle (1), *Journal Officiel de la République Française*, January 27, 2011, at 1680.

⁴⁶ Art 1 Loi 2011-103.

⁴⁷ Legge 12 Luglio 2011, n. 120 Modifiche al testo unico delle disposizioni in materia di intermediazione finanziaria, di cui al decreto legislativo 24 febbraio 1998, no. 58, concernenti la parità di accesso agli organi di amministrazione e di controllo delle società quotate in mercati regolamentati, *Gazzetta Ufficiale* N. 174 del 28 Luglio 2011.

foreseen by the new law provide for non-compliant companies to receive a warning with a four-month deadline to comply. If the company does not change its rules, it is to receive a fine of 20,000 euros and a second warning. If, within a further three months, no changes are introduced, the illegally appointed board members lose their positions. Finally, Belgium approved a law in 2011 aimed at achieving a share of women of 1/3 by 2019, with the following sanctions: illegal appointments will be invalid and the benefits for board members suspended.⁴⁸

The Netherlands and Spain⁴⁹ approved non-binding legislation with female quotas of 30% and 40%, respectively. In 2013, Denmark introduced a flexi-quota, allowing each company to establish its own targets, but no sanctions for non-compliance will apply.

In Germany female quotas are under discussion,⁵⁰ whereas other countries, including the UK, have only voluntary regulations anchored in corporate governance codes.⁵¹ Other Member States are lagging behind. For instance, the existing laws in Sweden and Poland do not foresee any targets or quotas.⁵²

3.2 Commission Proposal

In 2011, the Commission took the first steps to increase gender equality in companies. Specifically, the Commission encouraged publicly listed companies in the European Union to sign a ‘Women on the Board Pledge for Europe,’ to commit to an increase in the number of women on their boards by self-regulatory measures, and, by making

⁴⁸ Loi visant à promouvoir une représentation équilibrée des femmes et des hommes dans les conseils d’administration d’entreprises publiques économiques et de sociétés qui ont fait publiquement appel à l’épargne, Sénat de Belgique, Document législative no. 5-186-2 (1 février 2011) (adopted June 30, 2011).

⁴⁹ Ley Orgánica 3/2007, de 22 de marzo, para la Igualdad Efectiva de Mujeres y Hombres (Organic Law 3/2007, of Mar. 22, 2007, on the Effective Equality between Women and Men)

⁵⁰ The coalition agreement foresees introduction of gender quota: in non-executive boards starting from 2016 - 30% quota (with a sanction that the positions not taken by women have to remain free) and starting from 2015, rules forcing listed companies to adopt binding targets for executive, non-executive boards and highest levels of management which will be published and reported.
<https://www.cdu.de/sites/default/files/media/dokumente/koalitionsvertrag.pdf>

⁵¹ In the UK, Lord Davies report (a government-endorsed commission) recommended a voluntary 25% target in 2015 to be reached by FTSE-100 companies,
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf.

⁵² Davies and Hopt at 327.

commitments, to achieve a proportion of women on boards 30% by 2015 and 40% by 2020.⁵³

However, only 24 companies signed the pledge proposed by the Commission.⁵⁴ Lack of visible engagement of companies in improving the situation triggered the now-famous statement by Commissioner Reding: ‘I don’t like quotas, but I like what quotas do.’⁵⁵ In November 2012 the Commission put forward a proposal for a directive ‘on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures.’⁵⁶

The aim of the Commission proposal is ‘a floor of 40% presence of the under-represented sex among the non-executive directors of companies listed on stock exchanges.’⁵⁷ The idea behind the proposal is to ‘promote gender equality in economic decision-making’ and, in consequence, to achieve the Europe 2020 objectives.⁵⁸

Specifically with regard to fundamental rights, the Commission stated, following Articles 2 and 3(3) TEU, that equality between women and men is one of the Union's founding values and core aims. Moreover, Article 8 TFEU provides that ‘in all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.’ The Commission also argued that the proposal promotes the EU Charter rights, such as equality between women and men (Article 23) and the freedom to choose one’s occupation (Article 15). Article 21, which encapsulates the anti-discrimination principle in the Charter, read together with the exception allowing measures on specific advantages in favour of the under-represented sex spoke also in support of the conformity of the proposal with the Charter. Finally, because of the fact that the focal point of the proposal was on non-executive board members only, the interference with the right to run a business (Article 16) and right to property (Article 17) was proportional.

⁵³ MEMO/11/124, 1.03.2011. http://europa.eu/rapid/press-release_MEMO-11-124_en.htm

⁵⁴ See http://ec.europa.eu/commission_2010-2014/reding/womenpledge/.

⁵⁵ The Economist, Waving a big stick, Quotas for women on boards in the European Union are moving a little closer, <http://www.economist.com/node/21549953>.

⁵⁶ Proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures COM (2012) 614.

⁵⁷ Explanatory Memorandum, p.1, page 5.

⁵⁸ Ibid.

The legal basis of the proposal was Article 157(3) TFEU, which comprises the EU competence to adopt measures ensuring ‘the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.’⁵⁹ On proportionality, the Commission stressed that the proposal provides only for a minimum harmonization, and does not regulate small and medium-sized enterprises, for which following the quota requirement might have been overly burdensome.

Concerning the subsidiarity principle, the proposal went to explain the differences between the less and more supportive national provisions on gender balance in companies. The legal diversity resulted in a range from 3% to 27% of women within the boards.⁶⁰ Relying on its Impact Assessment, the Commission emphasized that female representation on boards will not achieve 40% by 2020 without further measures. Additionally, some Member States held back from regulating this area, for fear of becoming less competitive. Finally, the legal diversity was apt to produce problems in the functioning of the internal market, such as exclusion from public procurement because of lack of compliance with national binding quotas in another Member State. In sum, because only an EU-level action could effectively achieve a 40% female quota and diminish the internal market related problems, the proposal was in conformity with the subsidiarity principle.

Whereas the directive applies the notion of ‘under-represented sex’ the preamble shows quite clearly that it aims at enhancing the presence of women on company boards.⁶¹ The central provision of the proposed directive is Article 4, which sets a target for listed companies to achieve that women hold 40% of the director positions on non-executive boards by 2020, or by 2018 in case of listed companies that are public undertakings.⁶² The non-executive boards are those that are ‘not engaged in the daily management of the company and any member of a supervisory board in a dual board system.’⁶³ This distinction from executive members is important, as the

⁵⁹ See further Detailed explanation of the choice of the legal basis for the Commission's proposal for a Directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, SWD(2013) 278 final, 22.07.2012.

⁶⁰ Explanatory Memorandum, p.3, page 9.

⁶¹ See recital 16.

⁶² As provided in Art 10(2) of the proposal, the directive will expire in 2028.

⁶³ Art 2(4) of the proposal.

proposal foresees that the directive's objective is met in cases where the female members hold at least one third of all director positions, both executive and non-executive.⁶⁴ Member States may exclude from the application of a 40% quota listed companies where the members of the under-represented sex represent less than 10 per cent of the workforce.⁶⁵

The Commission also explained the reason why only non-executive board members fall within the scope of the directive. Namely, the limitation is necessary to diminish the impact on the day-to-day management of companies. Also, the directive only covers publicly listed companies for a number of reasons; first, they are economically important and have higher visibility; second, they set standards for the private sector as a whole; third they have larger boards and a similar legal status across the EU, which allows for more comparability.⁶⁶

The appointments should be carried out 'on the basis of a comparative analysis of the qualifications of each candidate, by applying pre-established, clear, neutrally formulated and unambiguous criteria.'⁶⁷ However, the proposal does not oblige the companies to appoint women so that their membership will be 50% or more of the non-executive members of the board, so that no 'excessive constraints' are put on companies.⁶⁸ In the selection procedure, Article 4(3) specifies that female candidates should be chosen if they are 'equally qualified as a candidate of the other sex in terms of suitability, competence and professional performance, unless an objective assessment taking account of all criteria specific to the individual candidates tilts the balance in favour of the candidate of the other sex.' The 'objective assessment' is a 'savings clause,' which avoids granting absolute and unconditional priority to female candidates.⁶⁹ Member States will be obliged to secure that listed companies reveal the qualification criteria for the selection if requested by an unsuccessful candidate. National judicial systems must shift the burden to the listed companies to prove that the rules of the choice of female candidates were not breached.

⁶⁴ Art 4(7) of the proposal.

⁶⁵ Art 4(6) of the proposal.

⁶⁶ Explanatory Memorandum, p.1, page 5.

⁶⁷ Art 4(1) of the proposal.

⁶⁸ Explanatory Memorandum, p.5, page 12.

⁶⁹ Anne Peters, *Women on Board: The EU Commission's Proposal for a Directive on Improving the Gender Balance among Non-Executive Directors of Companies Listed on Stock Exchanges and Related Measures* (2012).

The improvement of the gender balance is also directed at the situation in executive boards. The directive prescribes that listed companies should commit to improve the representation of both sexes among executive directors by 2020, or by 2018 in the case of listed companies which are public undertakings.⁷⁰ This is the so-called ‘flexi quota’ requiring companies to set their own individual targets for female members in the executive boards.⁷¹ The listed companies should report on the improvements in gender equality on executive and non-executive boards.⁷²

Finally, the Commission proposal foresees that Member States introduce sanctions for infringements of national provisions implementing the directive. Article 7(2), following the general formula in equality legislation on ‘effective, proportionate and dissuasive’ sanctions, exemplifies that they may take the form of administrative fines or a court’s annulment of an appointment contrary to the directive’s rules.

The Commission proposal has been assessed by Peters as ‘relatively modest’ – full gender parity has not been foreseen, and with a ‘quite soft’ quota, because at an advanced stage in a career, it is hard to define ‘equality of qualification.’⁷³ Yet, taking into account the persistent problem of low rates of female representation, the proposal seems to be ‘suited and necessary’ to address this problem and should in the future be complemented by educational measures and parental leave and childcare policies, which are at the origin of the need for gender quotas.⁷⁴

3.3 Reasoned opinions of national parliaments

Eight parliamentary chambers issued reasoned opinions on this proposal: the Danish Folketing, the Czech Chamber of Deputies, the UK House of Commons and House of Lords, both chambers of the Dutch parliament, the Polish Sejm and the Swedish Riksdag. The threshold for the ‘yellow card’ was not met, yet the arguments against the proposal require attention from the perspective of this chapter.⁷⁵

⁷⁰ Art 5(1) of the proposal.

⁷¹ Impact assessment, SWD(2012) 348, p. 52.

⁷² Art 5(2) of the proposal.

⁷³ Peters.

⁷⁴ Ibid.

⁷⁵ The Czech Senate (22.03.2013.), Romanian Chamber of Deputies (16.04.2013) and the Portuguese parliament (8.01.2013) have issued opinions within the ‘Barroso dialogue.’ The Portuguese parliament’s opinion was supportive towards the proposal, no subsidiarity violation has been stated. The Romanian parliament took in general a positive stance on the proposal with some reservations. The Czech parliament was against the proposal, arguing that the Commission should first focus on the

The Czech chamber argued that the Commission violated the subsidiarity principle that ‘the adoption of affirmative measures in accordance with Article 157, paragraph 4 TFEU should be taken as closely as possible to the citizens, in this case, at the level of the Member States.’⁷⁶ In the same vein, the Danish Folketing maintained that ‘a more balanced gender participation in company boards as well as at management level can be reached by way of national initiatives,’ and hence does not comply with the subsidiarity principle.⁷⁷

Parliaments stated that the evidence on which the Commission relies is not sufficient for the proposal of EU measures. For example, the Polish Sejm underlined the problems with the Commission’s evidence on the cause of gender under-representation, whereas the House of Commons argued that the Commission did not submit evidence confirming problems encountered within the internal market.⁷⁸

Moreover, the UK House of Commons and the Dutch chambers argued that the reforms in many Member States began only recently and that there is not yet sufficient evidence for the need of the EU to act.⁷⁹ For example, in Sweden, the companies listed on stock exchanges have taken steps by self-regulation aiming to achieve an equal gender distribution, whereas in the Netherlands, the upcoming reform sets the female equality target at 30%. As the Polish Senate summarised it, ‘the proposal is in effect aimed at substituting for legislation of those Member States, which do not decide to adopt positive legal measures to promote the under-represented sex.’⁸⁰ Following that approach, the House of Lords proposed that the Commission should rather issue non-binding recommendations to Member States to introduce some policy changes.⁸¹

The Polish Sejm posited that the proposal is contrary to the subsidiarity principle, because the 40% target only for non-executive directors reinforces gender stereotypes.⁸² In particular, the non-executive positions require less specialist

issues such as ‘discrimination in maternity and paternity leave, gender pay gap and overcoming of gender stereotypes.’

⁷⁶ Czech Poslanecká sněmovna, Reasoned opinion of 6.12.2012 on COM(2012) 614.

⁷⁷ Danish Folketing, Reasoned opinion of 14.12.2012 on COM(2012) 614.

⁷⁸ Polish Sejm, Reasoned opinion of 4.01.2013 on COM(2012) 614.

⁷⁹ UK House of Commons, Reasoned opinion of 18.12.2012 on COM(2012) 614; Dutch Tweede and Eerste Kamer, Reasoned opinion of 18.12.2012 on COM(2012) 614.

⁸⁰ Polish Senat, Reasoned opinion of 9.01.2013 on COM(2012) 614.

⁸¹ UK House of Lords, Reasoned opinion of 17.12.2012 on COM(2012) 614.

⁸² Polish Sejm, Reasoned opinion of 4.01.2013 on COM(2012) 614.

knowledge and experience. An additional argument raised in the political dialogue by the Czech Senate was that the applicability of the directive to the non-executive boards only ‘significantly limits the real impact on equal opportunities for women and men.’⁸³

Another argument against the directive raised by national parliaments was that the distinction between executive and non-executive directors envisaged in the proposal demands changes in national legislation.⁸⁴ In fact, both the Polish and Swedish chambers underlined that the position of board members is not identical to that of a worker.⁸⁵ Board membership is often based on trust and the direction and remuneration components might be missing.

In sum, the core of national parliaments’ argument was that they are better placed to improve the position of ‘women on boards,’ and that insufficient evidence had been advanced by the Commission to the contrary. The table in the annex illustrates the percentage of ‘women on boards,’ the national approach to the problem (legislation, corporate governance code), as well as whether the Member State submitted a reasoned opinion on the proposal. The table shows that reasoned opinions tended to be issued by parliaments in those Member States that had no existing legal quota and relatively high shares of women on boards. These countries often use corporate governance codes. National parliaments with relatively low shares of female participation on boards tended not to submit a reasoned opinion.

3.4 The Commission’s reply

In its reply to the parliaments, the Commission welcomed the legislative initiatives taken at the national level to improve the situation of women on boards in the Netherlands, Denmark and the UK.⁸⁶ Nonetheless, the Commission rejected self-regulation as an effective means to achieve gender equality. The Commission remained firm on its position, arguing that the majority of Member States are not committing to increasing gender equality in big companies, and an action at EU level is indispensable in this regard. However, Member States may follow their national

⁸³ Czech Senate, Reasoned opinion of 22.03.2013 on COM(2012) 614, point II 6.

⁸⁴ UK House of Lords, Reasoned opinion of 17.12.2012 on COM(2012) 614.

⁸⁵ Polish Sejm, Reasoned opinion of 4.01.2013 on COM(2012) 614 and of the Swedish Riksdag of 20.12.2012 on COM(2012) 614.

⁸⁶ Commission reply of 17.7.2013 to the reasoned opinion of the Dutch parliament; of 17.7.2013 to the Danish Folketing; of 19.6.2013 to the House of Commons on COM(2012) 614.

approach, as long as they can show that their existing national measures are ‘of equivalent effectiveness of reaching the target of a 40% representation of both sexes on company boards by 2020.’ The Commission also explained that ‘the method of achieving 40% would be binding (obligation of means), but not the 40% target itself.’⁸⁷ This approach, in view of the Commission, ‘reinforces the compliance of the Proposal with the principles of subsidiarity and proportionality.’⁸⁸

Replying to the argument raised by the Swedish Riksdag regarding the hampering of shareholders’ rights in appointment decisions, the Commission underlined that the proposed directive does not force the shareholders to take any specific appointment decisions.⁸⁹ The directive, in view of the Commission, aims only at making the appointment procedures more transparent, but the qualification criteria remain set by the companies themselves, applying the rules of the directive on the preference for equally qualified candidates of the under-represented sex.

In relation to the gender stereotypes argument raised by the Polish Sejm, the Commission stressed that as the directive also covers executive directors, and, as listed companies can show that members of the under-represented sex hold at least one third of all board positions, including executive directors, there is therefore no danger of prejudice.⁹⁰

3.5 Current proceedings at EU level

During the examination of the directive in the Council, it appeared that all delegations in principle supported improving the gender balance on company boards. However, some Member States stated their preference for national measures, while others supported EU legislation.⁹¹

In the EP, the draft report submitted for the first reading introduces some changes, such as extending the scope of the directive to non-listed public undertakings which do not fall under the definition of SME and to non-listed large undertakings.⁹² The report also proposes the tightening of sanctions. Listed companies that ‘do not

⁸⁷ Commission reply of 17.7.2013 to the Danish Folketing on COM(2012) 614.

⁸⁸ Commission reply of 17.7.2013 to the Polish Senat on COM(2012) 614.

⁸⁹ Commission reply of 7.6.2013 to the Swedish Riksdag on COM(2012) 614.

⁹⁰ Commission reply of 17.7.2013 to the Polish Sejm on COM(2012) 614.

⁹¹ Council of the European Union, 3247th Council meeting, Press release, 11081/13, p. 16.

⁹² Report on the proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, A7-0340/2013, 25.10.2013.

establish, apply or respect the foreseen procedures for the appointment or the election of non-executive directors shall be subject to effective, proportionate and dissuasive sanctions'. Specifically, these companies should be excluded from public calls for tender and partially excluded from the award of funding from the European structural funds.

In the plenary debate on 19 November 2013, Commissioner Reding welcomed the amendments proposed in the report, but was more reluctant with regard to the strengthening of sanctions, which may transpire to be disproportionate.⁹³ Subsequently, on 20 November 2013, the EP approved the Commission proposal.⁹⁴ The legislative resolution provided the additional sanctions applicable to infringements of the national provisions adopted pursuant to the directive: an exclusion from public calls for tenders and a partial exclusion from the award of funding from the European structural funds.⁹⁵

The proposal is currently awaiting the Council's first reading. Thus far, 'in an attempt to break the deadlock in the discussions,' two Member State delegations tabled a compromise package.⁹⁶

3.6 Assessment

There exist a number of arguments favouring gender equality on corporation boards. It gives expression to the principle of equality, social market economy and the principle of democracy.⁹⁷

First, establishing the gender quotas articulates the principle of equality between men and women, which is one of the foundational values of the EU, as expressed in Article 2 TEU. Moreover, one of the aims of the EU is to promote gender equality, as

⁹³ European Parliament, 14. Gender balance among non-executive directors of companies listed on stock exchanges (debate), 19.11.2013, PV 19/11/2013 – 14.

⁹⁴ 459 votes in favour, 148 against, 81 abstentions.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONGML%2bPV%2b20131120%2bRES-VOT%2bDOC%2bPDF%2bV0%2f%2fEN&language=EN>

⁹⁵ European Parliament, Legislative Resolution of 20 November 2013 on the proposal for a directive of the European Parliament and of the Council on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures, P7-TA(2013)0488. For an overview of the amendments proposed by the EP see also Council, Outcome of the European Parliament's first reading, No. 16284/13, 18.12.2013.

⁹⁶ Council, Progress Report, No. 16437/13, 22.11.2013, p. 5.

⁹⁷ Suk at 452 and Marek Szydło, 'Gender Equality on the Boards of EU Companies: Between Economic Efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance' [2014] European Law Journal n/a.

provided in Article 3(3) TEU and Article 8 TFEU. There is no doubt that the proposed directive contributes to this aim of the EU treaties. In this sense the treaties give significance to the equality between men and women as a ‘principal and moral value.’⁹⁸

Second, the EU’s aim to work for social market economy⁹⁹ ‘mandates democratic governance in the field of economics that consists in the broad participation of self-interested undertakings and other representatives (such as trade unions and non-governmental organisations) in the determination of the legal rules that will bind all these stakeholders.’¹⁰⁰ Gender equality is hence necessary to give legitimacy to industrial democracy, economic and social governance.¹⁰¹

Third, the principle of democracy speaks in favour of the directive. Exploring the binding quotas in Europe, Suk points at Scandinavian and French corporatism: ‘the traditions of formal collaboration between the state and corporate interests in the making of public policy (...) render it logical to expect corporations to be representative in order to legitimize the actions of the state.’¹⁰² In consequence, ‘[t]he state’s legitimacy is compromised when the largest corporations fail to represent half of humanity if these corporations are recognized as exercising state power.’¹⁰³

Even if the individual equality, social market economy and democracy arguments speak in favour of the Commission’s proposal, the question remains whether it is compatible with the principle of subsidiarity. Some scholars have assessed the proposal as not in compliance with the subsidiarity principle, because it is too soon to argue that the national measures are not effective.¹⁰⁴ Moreover, instead of imposing reforms, the EU should rather, following Article 4(2) TEU, support and respect the actions of the Member States.¹⁰⁵ It can, however, be argued that the Commission proposal does not violate the subsidiarity principle. With regard to the ‘Women on

⁹⁸ Marek Szydło, ‘Constitutional values underlying gender equality on the boards of companies : how should the EU put these values into practice?’ (2014) 63 *International and Comparative Law Quarterly* 167, 180.

⁹⁹ Art 3(3) TEU.

¹⁰⁰ Szydło, ‘Gender Equality on the Boards of EU Companies: Between Economic Efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance’, 11.

¹⁰¹ Szydło, ‘Constitutional values underlying gender equality on the boards of companies : how should the EU put these values into practice?’, 183.

¹⁰² Suk at 463.

¹⁰³ *Ibid* at 459.

¹⁰⁴ Szydło, ‘Gender Equality on the Boards of EU Companies: Between Economic Efficiency, Fundamental Rights and Democratic Legitimation of Economic Governance’ at 16.

¹⁰⁵ *Ibid* at 16.

boards' proposal, reasoned opinions came from chambers in Member States that tended to be relatively successful without imposing quotas, using instruments such as governance codes. These national parliaments can convincingly argue that they manage successfully at the national level and that other Member States are lagging behind. However, as argued in Chapter 2, the assessment of the subsidiarity principle should take into account the insufficiency of Member State action in general terms. Indeed, it can be argued that 'a necessary condition for Community action is that at least one Member State has inadequate means at its disposal for achieving the objectives of the proposed action.'¹⁰⁶

4 Scrutiny of fundamental rights proposals within the EWS

The central question of this chapter was how subsidiarity relates to fundamental rights. Under which circumstances is one level more apt to protect them than the other?

It has been posited by Muir that the subsidiarity test is not appropriate as a rule guiding the setting of fundamental rights standards because of the function of the subsidiarity principle and the nature of fundamental rights.¹⁰⁷ First, while the subsidiarity principle concerns the choice of the right level for the exercise of competences in a transnational context, some pieces of EU legislation 'give a specific expression' to a fundamental right '*within* States.'¹⁰⁸ Hence, there is a 'mismatch between the function of the principle of subsidiarity as defined in EU law and the function of fundamental rights standard-setting in the EU.'¹⁰⁹ Second, the nature of fundamental rights is that they express values; this is in contrast to the subsidiarity test based on effectiveness. In consequence, conflicting fundamental rights standards 'cannot be solved by comparative efficiency tests; they are instead concerned with prioritizing and balancing values.'¹¹⁰

In truth, the 'Women on boards' proposal only marginally concerns situations of truly transnational context, with substantive cross-border effects. Such a case would exist if a female member of a non-executive board would like to take advantage of the freedom of movement in the internal market and apply for a similar position in

¹⁰⁶ Lenaerts, 'Subsidiarity and Community competence in the field of education', 22.

¹⁰⁷ Muir at 239.

¹⁰⁸ Ibid at 240.

¹⁰⁹ Ibid at 241.

¹¹⁰ Ibid.

another Member State.¹¹¹ However, the case study proves that this piece of genuine fundamental rights legislation demanded from the national parliaments a value assessment; whether this right should be protected to a greater extent, despite the lack clear cross-border situation. Moreover, it should not be assumed that fundamental rights legislation cannot concern transnational situations. Examples include the Commission proposal on the right to strike or the draft directive strengthening certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings which concerned judicial cooperation in criminal matters with a cross border dimension.¹¹²

The question of effectiveness inherent in the subsidiarity test may also apply to fundamental rights, when applied to the practicalities of ensuring the protection of a fundamental right, for example by indicating in the impact assessment how a binding quota will improve the position of women in companies. Yet, this seems to reduce the right itself to a specific numerical measure, while gender equality and its protection obviously go beyond the share of women on a limited set of corporate boards.

One can also think about the protection of fundamental rights and subsidiarity looking at the issues of ‘process,’ ‘outcome’ (capacity of the levels of authority to deal with certain issues) and ‘willingness’ rather than subsidiarity as an efficiency measure, which is a more open ended approach to the allocation of the exercise of fundamental rights competences.¹¹³ With regard to the decision-making process and willingness, Grainne de Búrca argued that, on the one hand, fundamental rights matters are best decided on at the national level, because it has ‘the information, the capacity and the political legitimacy to intervene.’¹¹⁴ On the other hand, the balance can be tipped in favour of the EU or international level, which is ‘less mired in the immediacy of a local political situation [and] is the more appropriate actor in certain human rights matters, since it is more likely to have the will, the independence, the wider experience and the normative authority to act.’¹¹⁵ From the perspective of outcome, de Búrca argued that the national level might be more appropriate with regard to issues such as ‘articulating and defining the constitutional values and institutions for protection within that particular political and geographic community, and that an

¹¹¹ COM(2012) 614, Explanatory Memorandum, p. 3; recital 13 in the proposal’s preamble.

¹¹² COM(2013) 821.

¹¹³ de Búrca, ‘Re-appraising subsidiarity’s significance after Amsterdam’, 2-3.

¹¹⁴ Ibid at 4.

¹¹⁵ Ibid.

international institution may be the appropriate level for acting in other matters, such as in monitoring the way the nation state purports to give protection to certain minimum-level rights, or by censuring certain types of action in that field.’ On the contrary, one may also conclude that ‘while an international level of authority is best placed to evolve and articulate shared international values and standards of protection for human rights more broadly conceived, it is for the nation state, or even for more regional or local political actors to determine how those standards will be observed and implemented in concrete situations.’ The consequence is an ‘inevitable interaction between those different levels and actors in adopting and carrying through a particular policy in a given sphere.’

Looking at the proposal on ‘Women on boards’ in light of de Búrca’s views, acting at the EU level could increase the level of protection significantly in those Member States that at this point have very low shares of women on boards, such as Malta (3%), Hungary (5%) and Greece (6%). This could help these Member States to overcome national level constraints, such as the position of national parties concerning the position of women in society. For example, the vote of the Polish Sejm on the reasoned opinion on the ‘Women on boards’ proposal clearly indicated the political cleavages on this issue.¹¹⁶ Another apt example is furnished by the Commission proposal on the strengthening of the presumption of innocence. The reasoned opinion of the UK House of Commons underlined that the deficits in the protection of the presumption of innocence lay in the culture of Member States and thus it is only the national level that can change it.¹¹⁷ Yet, it is exactly this type of political constraint at the national level that proves the need for an EU level proposal to increase protection of fundamental rights. The EU proposal on female quotas thus seems to be a more apt measure to tackle gender equality on companies’ boards than leaving it to be regulated at national level.

¹¹⁶ Sejm, Sprawozdanie Stenograficzne z 31. Posiedzenia Sejmu Rzeczypospolitej Polskiej, 04.01.2013, p. 133.

¹¹⁷ House of Commons, Reasoned opinion of 10.02.2014 on COM(2013) 821, point 21. See also reasoned opinion of the Tweede Kamer arguing on a similar proposal – regulation concerning procedural safeguards for children suspected or accused in criminal proceedings – that the problems with enforcement of such safeguards occur within a Member State and should hence be solved there. Dutch Tweede Kamer, Reasoned opinion of 11.02.2014 on COM(2013) 822.

Conclusion

This chapter studied the interaction of the EWS and the EU's complex system of fundamental rights protection, showing that not only the judicial process, but also national parliaments, act as 'watchdogs' of fundamental rights. In particular, this chapter showed how national parliaments deal with fundamental rights questions in their reasoned opinions, some of which did however focus on the substance of the Commission proposals rather than the subsidiarity question. To this end, this chapter analysed three types of Commission proposals depending on whether, and to what extent, their objective is fundamental rights protection.

With regard to the EU draft proposals without such an objective, for example the EPPO regulation, this chapter has argued that concerns of national parliaments regarding fundamental rights protection should not be addressed within reasoned opinions when they concern the substance of the proposal. Next, the analysis of reasoned opinions on Commission proposals with mixed objectives, which partially pursue fundamental rights protection, revealed that national parliaments argue both that standards proposed by the EU are too low or too high. Finally, the case study of a 'genuine' fundamental rights proposal, 'Women on Boards', was used as a basis to discuss whether the subsidiarity review, which is based on assessing effectiveness of an action at different levels is apt to deal with the value balancing inherent in fundamental rights protection.

In particular, this chapter pondered the fact that fundamental rights issues often have a rather limited cross-border dimension. The conclusion seems to be that, while the 'Women on Boards' proposal, when reduced to numbers such as quotas can undergo national insufficiency and comparative efficiency tests, it is also true that, as a value, gender equality reaches beyond the purely numerical share of women on boards in public companies. Assuming, however, that subsidiarity is applicable to choosing the more apt level of protection of fundamental rights, at times the local political constraints may tip the balance in favour of the more willing, independent and experienced action of the EU legislator, while at other times, national political legitimacy concerns may tilt the balance towards the national legislator, leaving only the monitoring function to the EU level. Moreover, the universality of fundamental rights speaks in favour of legislative initiatives at EU level.

In sum, the question whether the EWS can apply to scrutiny of Commission proposals with fundamental rights objectives should be answered positively. It is, however, true that, because of the value nature of fundamental rights, the efficiency tests involved in subsidiarity reasoning might not be easily applicable, like for example the cross-border test, which would reduce fundamental rights to economic calculations. A different subsidiarity test for fundamental rights might be hence necessary. For example, such issues as the local boundaries of the political process, the political legitimacy and the willingness to act, must be taken into account in addition to the universality of fundamental rights, by the subsidiarity assessment.

Annex 1

Country	Share of Women among Members on Boards	National Approach	Reasoned Opinion
Finland	27%	Corporate Governance Code	
Latvia	26%	No Action	
Sweden	25%	Corporate Governance Code	Yes
France	22%	Legislative Quota	
Netherlands	19%	Legislative Quota	Yes
Denmark	16%	Corporate Governance Code	
Germany	16%	Corporate Governance Code	
United Kingdom	16%	Corporate Governance Code	Yes
Bulgaria	16%	No Action	
Czech Republic	15%	No Action	Yes
Lithuania	15%	No Action	
Slovenia	15%	No Action	
Slovakia	13%	No Action	
Poland	12%	Corporate Governance Code	Yes
Belgium	11%	Legislative Quota	
Spain	11%	Legislative Quota	
Austria	11%	No Action	
Romania	10%	No Action	Barroso
Ireland	9%	No Action	
Luxembourg	6%	Corporate Governance Code	
Italy	6%	Legislative Quota	
Estonia	6%	No Action	
Greece	6%	No Action	
Portugal	6%	No Action	Barroso
Hungary	5%	No Action	
Cyprus	4%	No Action	
Malta	3%	No Action	

Source: Prepared from data in Commission Staff Working Document, 'Impact Assessment on Costs and Benefits of Improving the Gender Balance in the Boards of Companies Listed on Stock Exchanges', SWD(2012) 348 final, 14.11.2012

Conclusions

Like the title of Paul Gauguin's painting 'Where Do We Come From? What Are We? Where Are We Going?' this conclusion puts the role of national parliaments in the policing of the subsidiarity principle into context. The findings of the thesis show, first, how the EWS developed after the entry into force of the Lisbon Treaty. The second section inquires into how its current practice reflects the two aims with which it was created: increasing 'democratic legitimacy' and diminishing the EU's 'competence creep.' Finally, the last section considers possible ways of further development of the position of national parliaments in the EU.

1 Findings of the thesis

This thesis studied the new role of national parliaments in the EU with regard to the policing of the subsidiarity principle. Its purpose was to examine why national parliaments participate in the EWS, and why they interpret the subsidiarity principle broadly. With the Lisbon Treaty, national parliaments have been strengthened and the subsidiarity principle has been made more robust due to the mechanism in Protocol No. 2. However, the consequences of these changes have been largely unexplored; in particular, the content of the reasoned opinions has not undergone a detailed analysis.

To answer the research questions, this thesis has studied the increasing role of national parliaments in the EU and the position and content of the subsidiarity principle. Possible means of inter-parliamentary cooperation on the review of subsidiarity and beyond have been also presented. Chapter 2 analysed in detail how the EWS is designed. It establishes that national parliaments' reasoned opinions do not always focus only on the subsidiarity principle under the EWS. They address issues such as the competence of the EU to act, the proportionality of Commission proposals or their substance. The case study on the EPPO proposal illustrated this tendency. This thesis has argued against this broad review of the principle of subsidiarity. A set of three arguments, namely textual, structural and functional, was put forward.

This thesis has also examined the design of national procedures for *ex ante* (Chapter 3) and *ex post* (Chapter 4) subsidiarity scrutiny. With regard to the *ex ante* subsidiarity review, it concluded that national parliaments have generally introduced

new provisions to accommodate the EWS, which fall into three general types of scrutiny, depending on the participating committees: centralised, mixed and decentralised. While it was hypothesised that the mixed system will produce the largest number of reasoned opinions, a direct impact has, however, not been established. At the same time, the procedures for *ex post* scrutiny at the EU level indicated that subsidiarity action is not a new type of procedure before the ECJ; parliaments can be labelled only as ‘indirect semi-privileged applicants.’ As *ex post* scrutiny relies on the governments that bring the case before the Court, the study of the internal design of the subsidiarity action found a causal link between the parliaments categorised as weak and strong EU affairs scrutinisers and the shape of their procedures. This chapter also defended the current ‘hands-off approach’ to subsidiarity; the ECJ would otherwise be forced to conduct political assessments that have been already taken, and to review the need for EU action already confirmed by a Council majority.

Chapter 5 studied the subsidiarity votes and debates in four Member States, and indicated that national parliaments have gained some independence from their governments in the EWS. Moreover, there was prevailing convergence of views on subsidiarity between the governing majority and the opposition; however left-right and socioeconomic cleavages remained visible to some extent. The reasoned opinions took into account that the Commission proposals might limit some of the regional competences in question. The analysis of the parliamentary debates in these Member States also showed that defending idiosyncratic national interests and fighting against the distributive character of EU policies might represent some of the key motivations behind issuing a reasoned opinion.

The following Chapters 6 and 7 focused directly on the question of why national parliaments participate in the EWS. Through a study of the complete set of reasoned opinions issued between December 2009 and August 2014, it has been shown that large numbers of reasoned opinions attacked the Commission’s proposals because of a putative violation of the principle of conferral, as well as, much more unexpectedly, because of the delegations in the Commission proposals to regulate by means of delegated and implementing acts. In both cases, the Lisbon Treaty did not grant national parliaments a competence to conduct a review in these areas. This leads to the conclusion that the participation in the EWS and its broad approach aims at

increasing the prerogatives of national parliaments with regard to EU policy-making. It has also been argued that, in normative terms, national parliaments should not take such a broad role. With respect to the principle of conferral, the ‘new order of competence’ of the Lisbon Treaty has brought clarity to whether the EU can act, in addition to both *ex ante* and *ex post* safeguards, which are more apt to pursue such scrutiny. Similarly, with regard to delegations by means delegated acts, not only is it a question of ‘horizontal division of power,’ but in addition, it was the EP and the Council that were granted a competence to revoke or object to the power of the Commission. Concerning the delegations to adopt implementing acts, the control of implementing powers is already in the hands of Member States.

Finally, Chapter 8, with a focus on EU fundamental rights, established that the subsidiarity test with regard to proposals with fundamental rights objectives is not easily conducted in efficiency terms or as a cross-border test, since the review in question focuses largely on values. In order not to narrow fundamental rights down to an economic calculation, it was argued that the right level of fundamental rights protection has to take into account the level of political legitimacy, and that the willingness to act must be taken into consideration by the subsidiarity assessment.

2 The EWS as an answer to the ‘democratic deficit’ and ‘competence creep’?

Since the EWS was widely seen as a tool that would combine the fight against competence creep with one that would bring more democratic legitimacy to the EU, these two issues should be addressed here.

2.1 Democratic deficit

In her assessment of the state of EU democracy Gráinne de Búrca underlined that despite ‘numerous efforts [having] been put over the decades, particularly in the last decade and a half to strengthen its democratic quality, we still see intractable democratic difficulties in the EU: popular alienation, distance between the ordinary citizen, the voter and the EU as a governing entity. The essence of democracy (...) – responsiveness to a real person – remains elusive in the EU context despite the work that has been done to build democratic institutions, despite parliamentary elections, a powerful European Parliament, the democratically elected members of the Council of

Ministers, enshrined principles of transparency, a strong EU court, layers of constitutional rights protection.’¹

This rather pessimistic account of the EU’s democratic legitimacy does not refer directly to the EWS. However, we may ask: did this new system improve the EU’s democratic credentials? This section will address this question, first, from the perspective of the impact of reasoned opinions on the legislative process. Second, it will critically assess the claim that a broad scrutiny of Commission proposals by national parliaments brings more democratic legitimacy to the EU. Third, this section will discuss whether the EWS compensates for a rather weak position of a national parliament in the scrutiny of EU affairs.

First, one way to measure the influence of the EWS on EU’s democratic legitimacy is to examine whether reasoned opinions have any real impact on the legislative process. However, the problem here is that Article 7 of Protocol No. 2 provides that the institution from which a draft legislative act originates shall take account of the reasoned opinions issued by national parliaments. Hence, in fact Protocol No. 2, except where the ‘orange card’ is triggered, does not create a direct link between national parliaments and the actions of the EP or the Council. In consequence, it is not easy to establish how far the MEPs and Council members take into account the reasoned opinions of national parliaments.

While in the case of the ‘Women on Boards’ proposal, the position of the EP shows support for the Commission proposal and even for strengthening it, the position of the Council is still unknown (Chapter 8). The case studies of the new Tobacco Products Directive and the EPPO proposal show, however, that some ideas have been taken on board by the EU legislator. For example, in the case of the Tobacco Products Directive, the approach taken in the EP upheld only less than half of the delegated acts foreseen by the Commission, removing controversial provisions on characteristic flavourings, the shape of unit packets and nicotine-containing products. With regard to one delegation, the EP directly regulated details of text warnings on tobacco products in the legislative act. This approach would be in line with the demand of national parliaments, yet it could be also explained by a general preference of the EP for legislation instead of delegation of power. The views of national parliaments did,

¹Gráinne de Búrca, *ICON·S 2014 Inaugural Conference speech 26.06.2014* (2014).

however, find some support within the EP and the Council in relation to the duration of the delegation. The EU legislator proposed that delegations should be limited to five years. As to the mode of delegation under delegated acts or implementing acts, only the delegated act on detailed rules for the shape and size of unit packets, to which national parliaments objected, was deleted by both the EP and the Council. Nonetheless, we cannot empirically ascertain the influence of national parliaments, as neither the Council nor the EP referred directly to the submissions of national parliaments as the reason for introducing these changes.

As to the high number of delegations, the EP also opted to limit the number of delegations, but again did not directly invoke the arguments of national parliaments. This specific objection of national parliaments did not find support in the Council; the final legislative act contains a high number of delegations to adopt delegated acts.² This might be due to the fact that Bulgaria, the Czech Republic, Poland and Romania were in the opposing minority in the Council, and hence their views were not taken into account in the general approach.³

The case study of the EPPO also shows that some of the criticism of national parliaments was of inspiration in the debates in the EP and in the Council. Regarding the structure of the EPPO, the Council proposed a model based on a college from all participating Member States.⁴ This change correlates with the reasoned opinions of the Dutch, French, Romanian, Maltese and Cypriot chambers. Furthermore, the Council exchanged the exclusive competence of the EPPO with a concurrent competence, meaning that both the EPPO and national prosecution authorities are competent to investigate and prosecute crimes against the EU budget, but that if the EPPO decides to exercise this competence, the national authority cannot exercise its own. This change is again in line with the criticism of national parliaments of the EPPO's exclusive competence. In addition, like some national parliaments, the EP pointed out that the scope of ancillary competence of the EPPO should be precisely determined. While *prima facie*, there is an overlap between the changes proposed by

² Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC Text with EEA relevance, OJ L 127, 29.4.2014, p. 1–38

³ House of Commons, 13th Report of the European Scrutiny Committee, p. 1.9, available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmeuleg/83-xiii/8302.htm>.

⁴ Council of the European Union, 8999/14, 15.04.2014, some specifications added in May 2014. Council of the European Union, 9834/1/14, 21.05.2014.

the EP and the Council and the reasoned opinions of national parliaments, in the absence of explicit evidence, it is impossible to trace the real impact that these opinions had within the legislative procedure.

As I presented in Chapter 1, the ‘Barroso initiative’ presents a valuable alternative for addressing non-subsidiarity related issues relating to Commission proposals in the EWS. The changes reported by the Commission, as well as discussed by Jančić,⁵ seem to show that the ‘Barroso initiative’ does have an impact on the EU law-making process. In this way, the idea behind the introduction of the EWS – to raise more subsidiarity awareness (*Subsidiaritätsbewusstsein*) among EU institutions – will not be endangered in consequence of ‘excessive and unfocussed’ use of the subsidiarity review.⁶

Second, at first blush, the argument ‘more parliamentary involvement brings more democratic legitimacy’ seems plausible. The examples of both EWS and ‘Barroso initiative,’ despite the impossibility to identify precisely the scope of that impact, show that reasoned opinions or opinions may have some influence at the EU level. However, it is hard to imagine that the EWS can correct the alienation of individuals vis-à-vis the EU. It is yet another complicated and distant mechanism, even if any aspect of a Commission proposal could be addressed.

The argument of more parliamentary involvement is often linked with the idea that national parliaments should have broad powers in assessing Commission proposals under the EWS. Weatherill approaches the question of the content of reasoned opinions by stating that ‘a formal legal approach would condemn the new procedures as ill-targeted.’⁷ Giving national parliaments more leeway with regard to competence control is capable of enriching the debate about the quality of EU law, especially as no ‘red card’ veto is foreseen. In addition, according to Weatherill, not allowing national parliaments to control its ‘near-relative proportionality’ is ‘artificial.’⁸ In sum, ‘national parliaments would be thereby empowered. But not too much.’⁹ It has been also argued that a narrowly tailored EWS undervalues the political nature of

⁵ Jančić, ‘The Barroso Initiative: Window Dressing or Democracy Boost’, 85.

⁶ Deutscher Bundestag, Protokoll der 8. Sitzung des Rechtsausschusses-Unterausschuss Europarecht, ‘Öffentliches Expertengespräch zu dem Thema: “Prüfung des unionsrechtlichen Subsidiaritätsprinzips”’, 16.06.2010, expertise of Franz Mayer (own translation).

⁷ Weatherill, ‘Competence creep and competence control’ at 45.

⁸ Ibid at 46.

⁹ Ibid.

national parliaments which are ‘completely political, and therefore “multifunctional,” and they are thus free to interpret the meaning and the function of their interventions in the EU decision-making process differently, according to the context and to the case in question.’¹⁰

There is however a set of arguments speaking against a broad subsidiarity review that would allow the EU to ‘live with subsidiarity’ without undermining its ‘capability to function.’¹¹ First, the textual, structural and functional arguments elaborated upon in this thesis point to why such a broad approach is not necessary. In addition, the practice shows that, in the case of the first ‘yellow card,’ the withdrawal of the proposal in a case where the Commission did not find convincing subsidiarity arguments caused a misunderstanding within national parliaments about their role in the EU legislative process. This was also confirmed by the major discontent of some national parliaments to the fact that the Commission did not withdraw the later EPPO proposal. Although Protocol No. 2 provides that the Commission may withdraw its proposal in the case of a ‘yellow card,’ this could only reasonably be expected in a case where the Commission itself is persuaded by the subsidiarity arguments in the reasoned opinions. The outcome of the first ‘yellow card’ was thus closer to a ‘red card.’ In consequence, in the second ‘yellow card,’ national parliaments expected their reasoned opinions to have a ‘red card’ effect once again. As argued by Convention Working Group I, which set the principles of the subsidiarity scrutiny, the EWS ‘should not make decision-making within the institutions more cumbersome or lengthier, nor block it.’¹² A possibility to allow a ‘red card’ procedure would have been ‘an enormous concession to the supposed wisdom of national Parliaments at the expense of efficient problem solving initiated by the Commission and carried forward by the Council and European Parliament.’¹³ In sum, the broadly designed EWS would not allow the EU, as feared by Pescatore, to ‘live with subsidiarity’ without undermining its ‘capability to function.’

¹⁰ Nicola Lupo, ‘National parliaments in the European integration process: re-aligning politics and policies’ in Marta Cartabia, Nicola Lupo and Andrea Simoncini (eds), *Democracy and subsidiarity in the EU* (II Mulino 2013) at 127.

¹¹ Pescatore at 1080 (own translation).

¹² European Convention, Conclusions of Working Group I on the Principle of Subsidiarity, CONV 286/02, 23.09.2002, Point I (2).

¹³ Weatherill, ‘Competence creep and competence control’, 44.

Moreover, a broad approach under the EWS would mean replicating the role already played by the ‘Barroso initiative’, which has had an effect on EU policy-making. Currently, the amount of opinions sent within the political dialogue outnumbers those within the EWS. This means that allowing broadly drafted reasoned opinions would also have probably increased their total number. For the Commission to go through these within a reasonable time and pick up from the views submitted the subsidiarity arguments would have involved certain concessions on the speed and efficiency of the legislative procedure, and would probably not satisfy national parliaments. Of course, some national parliaments already draft broad reasoned opinions, but it could be assumed that with a general concession in this regard, the approach would be more widely adopted.

Third, in another approach to ‘democratic deficit’, one could also look at whether the participation in the EWS compensates for a rather weak position of a national parliament in the scrutiny of EU affairs? Looking at the changes introduced by national parliaments after the Lisbon Treaty and the performance in the EWS, in fact, the performance of national parliaments in EWS seems to show little relationship with its degree of activity in EU affairs more generally. Using the ranking of Karlas,¹⁴ we find that, amongst the member states that are the most active in the EWS, some are highly ranked (Poland, Sweden), and some are ranked as particularly weak (France and Luxembourg) in their national position with regard to the scrutiny of EU affairs. Likewise, amongst those least active under the EWS, Finland and Slovenia are classified as strong parliaments, while Belgium and the Czech Republic are classified as weak parliaments. It seems thus that the EWS is not necessarily used by the weak parliaments as a new avenue of impact on EU affairs, but some of both weak and strong parliaments rely on the EWS to have more say on Commission proposals.

In sum, this section assessed the functioning of the EWS against the improvement of EU’s democratic legitimacy that the introduction of the system was supposed to ameliorate. First, in the absence of explicit evidence, it is impossible to trace the real impact that these opinions had within the legislative procedure. Nonetheless, as the EPPO case study shows, the national parliaments did raise valid subsidiarity

¹⁴ This is the most recent ranking on the strength of national parliaments in EU affairs (based on such indicators as the scope of parliamentary scrutiny of EU affairs; involvement of parliamentary committees in the scrutiny; mechanisms of influence such as mandating; the binding character of the scrutiny; and the role of the upper chamber) as it takes into account also new Member States. See in Karlas, Table 1.

arguments and the issues discussed were later discussed in the EP and in the Council. Second, this section rejected the argument that the broadly interpreted EWS (in connection with the expectation that the Commission will withdraw its proposals independently from the arguments raised by the parliament) plays an important role for EU's democratic legitimacy. The risk at stake is the EU's capability to function. Third, this section put forward that the EWS is used by some parliaments perceived as weak scrutinizers of EU affairs, but also by those that have strong powers under the national system of scrutiny. It seems hence that the EWS can not be directly linked to the empowerment of weak legislatures only.

2.2 'Competence creep'

The answer to the question whether the EWS diminishes the 'competence creep' seems to be more straightforward. As I presented in Chapter 6, 'competence creep' does not (only) concern questions about whether the EU has a competence or whether a legal basis has been chosen correctly; rather it asks whether the shared competence can be executed at national level, instead of being assimilated into the EU's competences.

With regard to the former problem, this thesis illustrated the concerns of national parliaments regarding the lacking competence and the choice of legal basis and pointed out lack of quality and understanding of the EU legal system. Moreover, on the basis of textual, structural and functional arguments I argued that the ECJ is better suited to conduct this type of scrutiny.

'Competence creep' understood as a condition in which the shared competence can be executed at national level, instead of its exercise at the EU level directly concerns the scrutiny of the subsidiarity principle. The Commission proposals studied in this thesis show that this type of 'competence creep' is much less underlined in the reasoned opinions of national parliaments. For example, the case study of the EPPO proposal does show that national parliaments raise the issue of a 'creeping competence' also in the relation to subsidiarity than the legal basis or competence of the Commission to enact the proposal at stake. The EWS seems hence to offer an appropriate avenue for addressing 'competence creep' by national parliaments. The design of the EWS, specifically the thresholds necessary for triggering the 'yellow' and 'orange' cards and the lack of a veto power for national parliaments in a situation of perceived

‘competence creep’ should however not be seen as making the procedure ineffective. The role of national parliaments under the EWS was to give an ‘early warning’ and not to stop the procedure; the Commission and in the case of ‘orange card’ also the EU legislator have a decisive voice on the matter.

Moreover, the fact that national parliaments in their reasoned opinions often raise issues that are not concerned with ‘competence creep,’ might be connected with the fact that ‘competence creep’ does not seem to pose major problems in the EU. In fact, two Member States have recently decided to inquire into the EU’s ‘creeping competence.’¹⁵ In June 2014, after a review of EU legislation conducted by each of the Dutch ministries in its area of specialization, a list of ‘54 points of action’ was drawn up, aiming to initiate a process in the EU, founded on the principle of ‘European where necessary, national where possible.’¹⁶ The Dutch proposal listed a number of recommendations, including, for example, that the legal basis of EU proposals should be clearly stated; where the EU has no competence, it should also refrain from making recommendations; EU proposals should concentrate on the main lines of policy and their goals, but not on their detailed regulation; and impact assessments should be used more often, so that the proportionality principle is safeguarded.¹⁷

With regard to the ‘points of action’: it is a list of areas which the government perceived as better left to Member States, yet without introducing any treaty change. Some ‘points of action’ clearly highlight that the issue at stake ‘can best take place at national level’ or that they do not have a ‘transnational character,’ as in the case of the ‘shock absorption fund’ for euro countries (point 11); the EU programme for school milk and fruit (point 25); the ‘pan-European forestry agreement’ (point 23); the ‘soil framework directive’ (point 31); and the tunnel safety directive (point 36). Yet, clearly not all these problems directly concern subsidiarity. For example, the government pointed out that, in some cases, no legislation was necessary, as was the case with regard to accessibility of public sector websites (point 41) and the

¹⁵ From the Board, ‘Review of the Balance of Competences’ (2014) 41 Legal Issues of Economic Integration 127.

¹⁶ Ministerie van Buitenlandse Zaken, Testing European legislation for subsidiarity and proportionality – Dutch list of points for action. See also Michael Emerson, ‘The Dutch wish-list for a lighter regulatory touch from the EU. CEPS Commentary, 1 July 2013’ <<http://ceps.eu/book/dutch-wish-list-lighter-regulatory-touch-eu>> .

¹⁷ Ministerie van Buitenlandse Zaken, Testing European legislation for subsidiarity and proportionality – Dutch list of points for action, p. 1-3.

environmental noise directive (point 26). Only one point found the legal basis problematic (see point 54 on organ donation). Other points concerned different aspects of proportionality: the statute and funding of EP political parties (point 1); the directive on spatial planning and integrated coastal management (point 30); or the Telecom package (point 39) were seen as simply going ‘too far.’ In other cases, the Netherlands, with regard to the application of delegated acts, will scrutinize the Regulation on the Customs Code (point 7) and the regulation laying down harmonized conditions for the marketing of construction products (point 9); and marketing standards for olive oil (point 24). Some comments concerned the substance of proposals, such as the Fund for European Aid to the Most Deprived (point 47).

This review of competences by the Dutch government shows a trend similar to that envisaged in this thesis. EU proposals very often raise the critical point of their proportionality and substance. With regard to the subsidiarity principle itself, the Dutch tested only the national insufficiency prong of the subsidiarity principle, without looking into the EU’s comparative efficiency.¹⁸ As the Dutch government underlined itself, it ‘fully accepts the existing distribution of competences. It is the division of tasks that it is aiming to discuss: is everything that the European Union currently does really necessary?’¹⁹

At the same time, in the UK, a process called ‘Balance of Competences Review’ is taking place and altogether 32 reports are planned. The aim is to analyse ‘what the UK’s membership of the EU means for the UK national interest. It aims to deepen public and Parliamentary understanding.’²⁰

The first report in the series inquired into the balance of competences between the UK and the EU in the Single Market.²¹ It concluded that there is an overall benefit to the UK from participation in the Single Market, confirmed by the evidence submitted, increasing both the EU’s and UK’s GDP relative to what it would otherwise have been, underlining however that ‘much depends on the future direction of the Single

¹⁸ See Andrew Duff, ‘Why the Dutch Version of the Balance of Competence Review will Not Please the Brits’ (2013) < <http://blogs.lse.ac.uk/euoppblog/2013/08/27/why-the-dutch-version-of-the-balance-of-competence-review-will-not-please-the-brits/> > .

¹⁹ Ministerie van Buitenlandse Zaken, NL Subsidiarity review-explanatory note.

²⁰ <https://www.gov.uk/review-of-the-balance-of-competences>

²¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227069/2901084_SingleMarket_acc.pdf

Market.’²² Furthermore, in the area of health, the balance of competence was likewise assessed as ‘broadly appropriate.’²³ Moreover, it is ‘generally strongly in the UK’s interests to work through the EU in foreign policy,’ and that Member States should remain in charge of the CFSP and CSDP, while some comparative disadvantages were also indicated.²⁴ With regard to the EU’s supporting competences in culture, tourism and sport, they were seen as ‘on balance either beneficial to the future development of these sectors and UK national interest or had the potential to be so.’²⁵ Some reports are more ambivalent. For example, the report on the free movement of persons was seen both as positive for the UK economy, but also in negative terms creating competition on the job market and problems connected to public services and housing.²⁶ Nonetheless, even in this case, the problem does not seem to be competence creep: the EU is not encroaching on a competence of a Member State; it is rather the effect of a certain policy.

In sum, the oversight of national parliaments over the ‘competence creep’ should be assessed positively. National parliaments can give an ‘early warning’ to the Commission and the EU Legislator that the issue at stake can be also sufficiently achieved at the national level. As the Dutch and British cases show, ‘competence creep’ is however not the main problem that the EU is facing now. Hence, the fact that there have been only two ‘yellow cards’ so far should not be interpreted as an argument that the EWS is an ineffective mechanism for decreasing the EU’s ‘competence creep.’

3 Outlook: Discussions on how to improve the EWS

There are currently two distinct lines in the discussion on the future role of national parliaments in the EU. The first concerns the ways to improve the EWS and the second focuses on the role of national parliaments in the Eurozone crisis. While the latter one is not connected to the main topic of this thesis, it is only briefly mentioned in Chapter 1. This section focuses thus on the possible strengthening of the role of

²² Ibid point 3.45.

²³ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224715/2901083_EU-Health_acc.pdf Point 5.1.1.

²⁴ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/227437/2901086_Foreign_Policy_acc.pdf, points 6.2. and 6.3. 6.4.

²⁵ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/279456/2901485_BoC_CultureTourismSport_acc.pdf, point 3.1.

²⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/335088/SingleMarketFree_MovementPersons.pdf

national parliaments within the EWS and beyond has been debated by parliaments and scholars alike.

Starting with the most innovative proposal advanced by Professor Damian Chalmers, he sees national parliaments as '[t]he institutions with most credibility to verify whether an EU measure adds democratic value.'²⁷ Chalmers perceives them as 'the central fora for democratic contestation within Europe and, as they lose by EU competence creep, do not have the same reasons as EU institutions to be passive about EU law.'²⁸ His proposal sets national parliaments as the guardians of the 'test of relative democratic authority' and the 'test of democratic responsiveness.' In addition, national parliaments should have an opportunity to pass laws that actively disobey EU law.

The first test endows national parliaments with a mandate to safeguard that the EU acts only 'where it enlarges choices or protects certain values in a way that cannot be done or has been historically poorly done by domestic parliaments, and the value of this action offsets any domestic democratic cost.'²⁹ In consequence, he proposes that two-thirds of parliaments will have to actively indicate their support for a Commission proposal for it to move forward. The second reform implies that one-third of national parliaments may request that existing legislation be reviewed or may put forward a new draft themselves, which would then put an obligation upon the Commission to act accordingly.³⁰ Finally, the 'test of democratic responsiveness' grants the opportunity to disapply EU law to any national parliament where 'an independent study has shown that the costs of EU law are higher than benefits for the Member State.'³¹ These reforms, per Chalmers, do not demand a Treaty amendment; a declaration from the EU institutions would be sufficient.³²

The House of Commons and the House of Lords have also recently proposed changes of the role of national parliaments in the EU. The House of Commons in its report advanced the idea of a mechanism according to which the House of Commons can decide prior to the adoption of a particular EU legislative proposal that it should not

²⁷ Chalmers at 8.

²⁸ Ibid.

²⁹ Ibid at 4.

³⁰ Ibid at 9.

³¹ Ibid at 10.

³² Ibid at 13.

apply to the UK.³³ Its consequence would be that the government should ‘express opposition to the proposal in the strongest possible terms, including voting against it.’ In addition, the House of Commons proposed the introduction of a possibility for the chamber to ‘disapply parts of the existing *acquis*.’³⁴ The House of Lords, on its side, picked up the idea of the reform on initiating legislation, however making it lighter, and labelling it a ‘green card’ – ‘a right for a number of national parliaments working together to make constructive policy or legislative suggestions, including for the review or repeal of existing legislation, not creating a (legally more problematic) formal right for national parliaments to initiate legislation.’³⁵ Other changes suggested by the House of Lords concern including the proportionality principle into the scope of the subsidiarity review and an undertaking by the Commission to drop a proposal or amend it in case of a ‘yellow card’.³⁶

The main criticism of the first ‘test of relative democratic authority’ is comparable to that of giving national parliaments a ‘red card.’ Just one third of parliaments can effectively block a proposal simply by remaining passive and withholding support, in contrast to the existing ‘yellow card’ and ‘orange card’ procedures, which first require parliaments to be active in order to block a proposal and second have higher thresholds for the share of parliaments required to trigger action. Furthermore, even without a sizeable minority of parliaments against, the need for a positive reply of two-thirds of national parliaments each time the Commission presents a proposal demands a constant vigilance on the side of the national legislatures. Because this might be hard to maintain, it is quite possible that such a threshold will not be easily achieved. This is why this test seems to have the character of a ‘red card’ but with an even lower hurdle required to block a proposal than the rejected actual ‘red card’ proposal put forward during the Convention, which required two-thirds of parliaments to voice their opposition on subsidiarity grounds.

An argument against any type of ‘red card’ is that it would be ‘an enormous concession to the supposed wisdom of national Parliaments at the expense of efficient problem-solving initiated by the Commission and carried forward by the Council and

³³ House of Commons, European Scrutiny Committee, *Reforming the European Scrutiny System in the House of Commons*, Twenty-fourth Report of Session 2013-14, para 170.

³⁴ *Ibid.*, para 171.

³⁵ House of Lords, European Union Committee, 9th Report of Session 2013-14, para 58.

³⁶ *Ibid.*, para 79 and 95.

the European Parliament.³⁷ In Weatherill's view, the idea promoted at the time of the Convention that 'the proper corrective to perceived problems in today's European Union is enhanced national "control" over the European institutions' is 'troublingly backward-looking'.³⁸ The risk at stake is that "[n]ationalising" the context in which EU decisions are taken may produce selfish State-centric outcomes which fail to pay heed to the need to adjust political decision-making in line with the growth of economic and social activities undertaken in the transnational domain.' Ergo, 'greater involvement of national Parliaments is not necessarily a virtue.'

The second reform – whereby when national parliaments think that new legislation should be proposed, the Commission will be under an obligation to propose a corresponding piece of legislation – can have a negative impact on the EU's balance of powers, which is an 'essential constitutional value',³⁹ and compromise the role of the Commission as an initiator of EU legislation.⁴⁰ Similarly, the operation of a more modest 'green card' might coincide with the already existing possibility of an invitation of the European Council for the Commission to present a proposal. Furthermore national parliaments can always convince their governments to back their proposal through this forum.⁴¹ Finally, the possibility to disapply EU law by national parliaments, even if only in limited cases, could disintegrate the EU system, by breaching the EU principle of loyalty enshrined in Article 4(3) TEU that commands Member States to take measures 'to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union.'

Despite the arguments that can be raised against an enhancement of the role of national parliaments and seeing the current shape of the EWS as not 'incurr[ing] costs by impairing effective EU decision-making and imbalancing existing institutional arrangements',⁴² in June 2014 the chairmen of most of the EU affairs committees of national parliaments addressed a letter to Jean-Claude Juncker, the Presidential nominee of the Commission. They called a working group, which would include

³⁷ Weatherill, 'Competence creep and competence control', 44.

³⁸ Weatherill, 'Using national parliaments to improve scrutiny of the limits of EU action', 909.

³⁹ De Witte, 'Community law and national constitutional values', 7.

⁴⁰ The EP can however ask the Commission to present legislative proposals for laws to the Council. Yet, the proposal of Chalmers clearly gives an initiative to national parliaments themselves.

⁴¹ See the evidence given by Commissioner Šefčovič to the House of Lords, Select Committee on the European Union Inquiry on the Role of National Parliaments in the European Union, Evidence Session No. 6 Heard in Public, Question 94, 7.01.2014.

⁴² Weatherill, 'Using national parliaments to improve scrutiny of the limits of EU action', 911.

members of national parliaments and representatives of EU institutions, with the aim of drafting ‘an action plan on ways to strengthen the role of national parliaments in the European Union.’⁴³ The letter underlined that the participation of national parliaments must move beyond the subsidiarity review and the oversight of their respective governments’ actions in the Council. In this regard, the letter explained that three national parliaments (the Dutch Tweede Kamer, the UK House of Lords and the Danish Folketing) had advanced some proposals, which focus on the following questions. The first concerned designing a democratic framework that would take into account the enhanced role of the EU in economic governance, while at the same time respecting the prerogatives of national parliaments. The second and third questions were more generally asking about possible ways of national parliaments’ contributions to the good functioning of the EU and ensuring that EU citizens are not ‘alienated’ from the EU decision-making process. The working group of the Commission could thus address these questions.

It remains to be seen whether and how the EWS can be upgraded in the future. As proposed and assessed in this thesis, the EWS seems to be an improvement from the perspective of its two pursued aims of bringing more legitimacy to the EU legislative process and decreasing the EU’s ‘competence creep’.

⁴³ Joint Letter to Mr Juncker, ‘on the establishment of a Commission working group on the role of national parliaments in the EU,’ 30.06.2014.

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